

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

UNITED STATES OF AMERICA Criminal No. RWT-12-0480

v. Greenbelt, Maryland

JOSE JOAQUIN MORALES, September 20, 2013

Defendant. 9:00 a.m.

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography,
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P R O C E E D I N G S

MS. WILKINSON: Good morning, Judge Titus.

Calling the matter of United States of America v. Jose Morales, Criminal Number RWT-12-0480. Sandra Wilkinon and Martin Clarke on behalf of the U.S. Attorney's Office. With us at counsel table, Special Agent Mark Royka from the D.E.A. We're here today for a motions hearing prior to a Tuesday, September 24th trial date.

THE COURT: All right.

MR. ZUCKER: Jonathan Zucker on behalf of Mr. Morales. With the Court's permission, Meghan Moore is a student intern if the Court would allow her to sit in.

THE COURT: Happy to have her with us. I hope she can learn something.

MR. ZUCKER: Thank you.

MR. PROCTOR: Good morning, Your Honor. Gary Proctor --

THE COURT: Good morning.

MR. PROCTOR: -- for Mr. Morales, who is seated to my right.

THE COURT: All right. Before we get into the matters today, I don't believe anybody has filed instructions yet. While in a four-week trial, it's not critical to have them on the first day. But one thing I really, really need to have from you is an uncontroverted

1 instruction as to the elements of the crime because it's
2 my practice in preliminary instructions to the jury which
3 is a form that reads -- to tell them what the elements are
4 so that they can be listening to see whether the elements
5 have been proven or not. I assume with a single count
6 case like this that the elements can't be very
7 controversial.

8 MS. WILKINSON: I think there are some -- well,
9 first, Your Honor, we have completed government proposed
10 instructions. We provided them to the defense this
11 weekend or something. And Mr. Proctor has given me
12 detailed agreements and challenges to them. I have taken
13 them and incorporated them, but I haven't put my eyes on
14 them enough --

15 THE COURT: Is there any big problem on the
16 elements?

17 MS. WILKINSON: Not on the elements themselves
18 like a Sand instruction. There are nuances in the laws,
19 instructions the government is requesting and I think that
20 the defense are as well, but not on the basic --

21 THE COURT: What I'm looking for is undisputed
22 elements. Not the discussion of the elements.

23 MS. WILKINSON: Right.

24 THE COURT: You know somebody did something with
25 the intent to do da-ta-da, something like that. Whatever

1 the elements are.

2 MS. WILKINSON: I can provide that.

3 THE COURT: I just need that so that I'm
4 comfortable giving that without of controversy on the
5 first day of trial.

6 MS. WILKINSON: I'll talk to Mr. Proctor about
7 it after the hearing. But there are Sand instructions.
8 They are very simplistic. They're physically three
9 elements and I'll provide them to the Court.

10 THE COURT: Well, all of you at one time or
11 another or most of you at one time or another have been
12 through a trial with me. But my practice is to take those
13 instructions that have been submitted to me and mark them
14 up as we go during the trial. And at some point when it
15 looks like the instructions are pretty close to okay based
16 upon what the evidence has been to give them to the
17 counsel marked up so you can see what I did.

18 Most of what I do to Sand and Seifurt
19 instructions is to get rid of redundancies and stop
20 calling myself the court which I don't like doing because
21 my name is Roger Titus, not the court. So all right. One
22 other preliminary matter --

23 THE DEFENDANT: Can I speak on the jury
24 instructions?

25 THE COURT: One second, sir. I'm talking right

1 now. Okay. The marshal has asked me to raise with the
2 parties the question of incarcerated witnesses who have
3 been writted in. They all have been writted in for
4 Tuesday. So we're going to have a traffic jam of
5 witnesses sitting here. Can you confer with each other
6 and let me know what are the days they actually need to be
7 here so we don't keep trucking people back and forth?

8 MS. WILKINSON: Of course. And we would rather
9 that be, Your Honor. Obviously, I don't believe they were
10 all for Tuesday, but I will talk to --

11 THE COURT: I don't know your witness list and I
12 don't know who's calling incarcerated witnesses. But it
13 seems to me that both sides are calling incarcerated
14 witnesses. So I'm asking you as officers of the court to
15 talk to each other and please let the marshal know with
16 plenty of advance notice who needs to be here on what day.
17 But they've all been subpoenaed for the first day of trial
18 which is not going to work.

19 And I want to remind you that I have practices
20 that I follow in connection with trials which are pretty
21 simple. But I want to have at the close of business each
22 day, whoever's side is going, whether it's prosecution or
23 defense, to disclose to the other side who the witnesses
24 are for the next day and what the documents are that are
25 going to be offered the next day so that people can go

1 home and prepare for the right witnesses and the right
2 documents and that applies to both sides. So in the case
3 of the government, you need to be able -- I don't know if
4 we are going to get to witnesses on Tuesday or not. But
5 you should be able to tell the defense who those people
6 are going to be on the first day of trial by Monday.

7 MS. WILKINSON: In fact I've already talked to
8 Mr. Proctor about the beginning of the trial and who the
9 potential witnesses are.

10 THE COURT: And I believe Mr. Morales has some
11 question.

12 THE DEFENDANT: No. I just want to go on record
13 about the jury instructions. Anything that's modified or
14 substituted from Sand, I want to object to it and I want
15 to know exactly everything that's modified on it.

16 THE COURT: Sir, I can't rule on anything until
17 there's something to object to. But I -- sir, you got
18 counsel representing you. So --

19 THE DEFENDANT: I still want to put on the
20 record --

21 THE COURT: Well, you've got on the record with
22 regard to any modifications of Sand and Seifurt that I
23 make to them, you'll see. And one page at a time, we'll
24 go through the instructions. And any objections to any
25 edit made by me or anybody else can be addressed at that

1 time.

2 THE DEFENDANT: Thank you.

3 MS. WILKINSON: And, Your Honor, I'd like to
4 make it clear as the Court just did that Mr. Morales has
5 counsel and that he is not here to represent himself and
6 obviously, the Court directs what happens in the
7 courtroom --

8 THE COURT: I think I made that clear to
9 Mr. Morales. Mr. Morales, you have attorneys, very, very
10 good attorneys representing you. If you have a concern
11 about the instructions, you communicate that to them --
12 those objections to the attorneys and they will raise them
13 with me. They're trained in doing that and they'll do a
14 fine job. Most of the edits that I make to these
15 instructions are going to be style. And if anybody thinks
16 style is in fact substance, we can address that when and
17 if it happens.

18 All right. Now this case is set for four trial
19 weeks of four days a week. It really can't go longer than
20 that because of stuff right behind it. So --

21 MS. WILKINSON: And, Your Honor, I think you
22 will be glad to know I've spoken to defense counsel and we
23 have really worked hard on some agreements and who our
24 witnesses will be and I think at the end of the day, the
25 government should be able to get their case in in two good

1 solid trial weeks. So I think we will get it done in
2 three weeks.

3 THE COURT: All right. I just want to make sure
4 that I was not sitting in front of people who think this
5 is going to be a six-week trial because we can't do that.

6 My plans are to impanel four alternate jurors
7 because of the length of the trial. And I will pray that
8 we get through the jury selection without too much of a
9 crisis for jurors who have to be stuck here in Greenbelt
10 for four days a week for four weeks.

11 Most of you probably know this. But in
12 connection with the voir dire, the voir dire you have
13 given me and I'm reviewing that now, I'm going to divide
14 that into two basic categories. One is the questions that
15 you will be happy to answer in front of strangers and the
16 others is ones you would not.

17 And I will with respect to the ones that are
18 more sensitive, I will reduce them to bullet points. I
19 will put a bullet point version on them on the screen.
20 You can look at the bullet point version before I do it.
21 That's so that I can read ten or so questions and they can
22 see the shorthand version of them while they're sitting
23 there. They will also be up when they come up to the
24 bench to review it.

25 If you have objections to a juror when that

1 jurors comes up here, please make the objection before the
2 next juror comes up. Otherwise, you will have waived your
3 objection. I can't a half an hour after I've interviewed
4 a juror have an objection raised that could have been
5 raised when the juror was up here.

6 I believe based upon my intention to impanel
7 four alternate jurors, that we will have the capacity to
8 pick a jury once we get through and do not have any
9 objections to 36 jurors. That's on the basis of a jury of
10 16 people plus 6 strikes for the government, 10 for the
11 defense, 2 for the government alternates, 2 for the
12 defense and alternates. That's my reading of the rules.
13 So I think 36 is the magic number unless you think my math
14 is not correct and I don't profess to be a mathematician.

15 All right. well, let's start going through the
16 matters today. Some of these are not going to take much
17 time. Some of them may take more time. So does the
18 government have any particular preference on how we go
19 down this? I printed up the list for all the open
20 motions. There are some additional motions that have come
21 in since I first prepared this.

22 One I think I can dispose of pretty quickly is
23 the Document 103 which is a motion for reduction of
24 presentence reports of government witnesses. That is not
25 generally done as a matter of course. So I need to have

1 some particular demonstration with respect to any
2 particular witness. You don't have a right to go fishing
3 through a presentence report. I in ten years I think I've
4 authorized inspection of a presentence report, but in
5 redacted form once. So I need to have a proffer as to
6 something other than I'd like to look at the presentence
7 report. So if you have additional grounds for seeking
8 presentence reports, let me know.

9 MR. PROCTOR: There's two things, judge. First
10 of all, every plea offer says if you're a career offender,
11 your numbers go up.

12 THE COURT: You have to get close to the mic.

13 MR. PROCTOR: Sorry. Specifically, we're
14 dealing with career offenders. I have the NCIC reports.
15 As you probably know, they're hard to read. They're
16 double dutch. I can't determine if someone is a career
17 offender based on an NCIC report.

18 The presentence report will make it crystal
19 clear. This person has two qualifying convictions being
20 these two on these dates and is, therefore, a criminal
21 offender. When we're talking about the benefits of
22 cooperation, as the Court knows, if you're a career
23 offender, the benefits to cooperation are manifestly more.
24 So that's one thing.

25 The second thing is in the presentence report,

1 probation officers typically ask do you have any mental
2 health issues, do you have any substance abuse history?

3 THE COURT: well, do you have any information
4 that would indicate one of these witnesses does have any
5 of those issues?

6 MR. PROCTOR: Yes, sir.

7 THE COURT: well, then you need to -- I mean I
8 don't think I need to spend a lot of time on this today.
9 You need witness by witness to tell me what it is that you
10 think is in the presentence report that would be
11 appropriate for disclosure under the case law in the
12 Fourth Circuit and I will be glad to entertain it at that
13 time.

14 The one and only time I did this, the -- I have
15 access, of course, to the full presentence report. The
16 government gave me what they thought would be consistent
17 with their obligations of disclosure in fairness to you a
18 redacted version. I looked at the redacted version. It
19 was very heavily redacted because of very large amounts of
20 a presentence report are not appropriate for disclosure.
21 And I disclosed some of the information from the
22 presentence report. I'm willing to do that process, but
23 you have to make a showing that is required in the Fourth
24 Circuit for that witness by witness.

25 So I'm going to deny your motion without

1 prejudice to your right to renew the motion with respect
2 to witness by witness.

3 If you believe that the issue is going to arise
4 in connection with Mr. Jones who's going to testify on
5 Thursday, don't raise it on Thursday. Let me know
6 Wednesday that or Wednesday morning that there's a witness
7 coming on Thursday or some day after Wednesday that you
8 think you'd like to see all or portions of a presentence
9 report. Talk to the government counsel. Maybe you can
10 work something out. But I'm more than happy if you made
11 that requisite showing to look at the unredacted
12 presentence report and the one that has the information
13 that would be disclosable to you for the reasons that
14 you've indicated and I'll be glad to do that.

15 So I'm going to deny 103 without prejudice. You
16 can renew your motion witness by witness. As I said, do
17 it in advance of the time when the witness is going to
18 testify. Okay?

19 MR. PROCTOR: Yes, sir.

20 THE COURT: That takes care of 103. I
21 believe -- I've got a chart of motions here that somebody
22 prepared. But the first one, this says 14. That's not
23 the correct docket number. I think it's 17.

24 MS. WILKINSON: Oh, sorry about that, Your
25 Honor.

1 THE COURT: And I think in connection with that
2 motion, 17, that the documents have been provided to the
3 defense and it's moot. Is that correct?

4 MS. WILKINSON: Yes, Your Honor. That's the --

5 THE COURT: Any dispute about that?

6 MR. PROCTOR: No, sir.

7 THE COURT: So I'm going to go down my little
8 list of motions here. 17 will be denied as moot. I said
9 103 is denied without prejudice that we know.

10 MR. ZUCKER: Judge, can we raise another matter
11 scheduling-wise? There's a witness, another lawyer from
12 Florida that has brought in -- Texas.

13 THE COURT: Is he here?

14 MR. ZUCKER: He's in the courtroom. He's Mr.
15 Morales' private counsel -- a prior counsel. I think he
16 would like to get out of here and --

17 THE COURT: Let me see if I can take care of a
18 couple of minor ones and then we will go right into that
19 motion --

20 MR. ZUCKER: Perfect. Thank you, judge.

21 MR. PROCTOR: That would be 58, Your Honor.

22 THE COURT: 58. Okay. 58 I think is going to
23 take a little time to go through that. So let me just see
24 if I can get rid of some simple ones.

25 The next one I have is 50 and that's a request

1 for alibi notice. And is there any response on that?

2 MR. PROCTOR: We are not intending to introduce
3 an alibi.

4 THE COURT: All right. Then that is moot. We
5 don't need to go any further on that one.

6 Then I've got that -- well, I think 54, 58 and
7 78 are all one package. So we are going to have to do
8 this one at a time.

9 Another one I think that's probably routine is
10 Number 81 which is the government's motion to unseal
11 certain documents. There was no response given to that.
12 Unless there's an objection, I will grant that motion.

13 MR. PROCTOR: There's no objection.

14 THE COURT: All right. Then I will grant that
15 one.

16 I've already granted 82 which was the motion to
17 correct a typographical error in the indictment and that's
18 done.

19 The defendant moved in Number 86 for disclosure
20 of 404 evidence and the government has responded. Do you
21 need anything more than that?

22 MR. ZUCKER: I think we need to argue whether or
23 not it's properly intrinsic. They filed their response
24 saying this is what we intend to introduce and we view it
25 as intrinsic. We take a different view and believe --

1 THE COURT: Well, that relates to a huge
2 universe of things --

3 MR. ZUCKER: It does.

4 THE COURT: -- that I can't -- I mean I really
5 can't on a pretrial basis make a global ruling on that.

6 MR. ZUCKER: I think there are some of them that
7 we won't object to and then there is some that we will.
8 So if you want to at least flag the issue so you'll have
9 our thoughts on it and then decide --

10 THE COURT: What I'm going to do, I'm going to
11 deny this without prejudice to your right to object on any
12 allegedly 404(b) evidence as being offered by the
13 government. Their position is some of its intrinsic.
14 That it's covered by the exceptions under 404(b). But I
15 can't make a global ruling on it because there's a large
16 universe of evidence that's subject to this motion.

17 MR. ZUCKER: I think we can probably move in
18 limine on some of them. And then if not, since we are
19 going to be objecting, I guess the question becomes will
20 it be referenced in openings. And some we're not going to
21 object to at all and those are fair game and we might as
22 well clarify that.

23 THE COURT: Before we finish today, I want to
24 talk about what are the hot button issues that people
25 think shouldn't be mentioned in opening and I can address

1 the question of whether I'm going to tell them don't
2 mention those things in opening.

3 MR. ZUCKER: Okay.

4 THE COURT: But I'm going to deny the
5 defendant's motion without prejudice to make individual
6 objections during trial to specific evidence. And I do
7 understand Rule 404(b) and intrinsic and extrinsic and so
8 forth.

9 MR. ZUCKER: I'd just ask if we can address what
10 we can pretrial so we know what's coming in.

11 THE COURT: Okay. All right. I think we can --
12 let's go into the one where we have the witness from Texas
13 here. The government's made a notice of what it intends
14 to offer in 54. The defendant has moved to suppress and
15 the government has responded in 78. So this is a --
16 essentially, a defense motion to suppress. So let me hear
17 you on that.

18 MR. PROCTOR: Well, there is, Your Honor. But I
19 guess there's also the question of voluntariness and I'm
20 assuming the government is going to call an agent outside
21 the presence of the jury later with regard to that.

22 MS. WILKINSON: I have so indicated to
23 Mr. Proctor and Mr. Zucker and I can do that with the
24 agents actually from Texas in one fell swoop. But also we
25 would make the argument that it was per se voluntary

1 because his attorney was sitting right next to him when he
2 made these statements.

3 THE COURT: I mean there's several issues in
4 this motion. But the one I want to focus on is the theory
5 that the defense has advanced as to advice given in Texas
6 somehow making excludable here. That's what I want to
7 hear about. I mean the question of whether it's voluntary
8 because it was in an incarcerated setting, we'll deal with
9 that on a factual basis. I have to look at the totality
10 of the circumstances and see whether under all those
11 circumstances, it was voluntary or involuntary.

12 MR. ZUCKER: Judge, a few moments to consult
13 with Mr. Proctor.

14 THE COURT: I can't hear you, sir.

15 MR. ZUCKER: Just a quick moment to consult with
16 Mr. Proctor.

17 MR. PROCTOR: At this time we would call Eric
18 Jarvis.

19 THE COURT: All right.

20 THE CLERK: If you could just step up there and
21 raise your right hand for me, please?
22 Thereupon,

23 ERIC JARVIS,
24 having been called as a witness on behalf of the
25 defense and having been first duly sworn by the

1 Deputy Clerk, was examined and testified as follows:

2 THE CLERK: Thank you. Please be seated.

3 MR. PROCTOR: And, judge, as a preliminary
4 matter, Mr. Jarvis raised with me and I think he's
5 correct. He did represent Mr. Morales. There would be an
6 attorney/client privilege. To be clear, I'm not getting
7 into the substance of any conversations he had with
8 Mr. Morales. What Mr. Morales said to him, what he said
9 to Mr. Morale, anything like that. So I don't believe
10 there is any attorney/client privilege to be waived. It's
11 the chronology and who was there and where the meetings
12 occurred and that sort of stuff.

13 THE COURT: It really depends on the question.
14 I don't know until I hear a question whether there's an
15 attorney/client question to be raised at all.

16 MR. PROCTOR: Okay.

17 THE COURT: I think what you're telling is that
18 Mr. Morales does not waive attorney/client privilege with
19 respect to the --

20 MR. PROCTOR: Well, to the extent it comes up,
21 then --

22 THE COURT: I mean this is a rather unique use
23 of Strickland and other things like that. But I mean if
24 you're attacking what he did, does that not have an
25 implications for whether or not he can respond as to why

1 he did what he did --

2 MR. PROCTOR: well, I guess --

3 THE COURT: -- which may take into account what
4 he was told by his client?

5 MR. PROCTOR: well, you're right and we'll jump
6 in and if --

7 THE COURT: Let's do one question at a time.

8 THE CLERK: Okay. Excuse me. Could I just get
9 the witness to state his name for the record, please?

10 THE WITNESS: Eric Jarvis.

11 THE CLERK: Spell the lastname for me.

12 THE WITNESS: J-A-R-V-I-S.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. PROCTOR:

16 Q Good morning, Mr. Jarvis.

17 A Good morning.

18 Q And we all appreciate you being here all the way
19 from McAllen on short notice. That gentleman sitting over
20 there in the jumpsuit. Do you recognize him?

21 A Yes, sir.

22 Q What is his name?

23 A Jose Joaquin Morales.

24 Q And to step back a moment, what is your
25 profession?

1 A I'm an attorney.

2 Q And where do you practice?

3 A In McAllen, Texas.

4 Q And how long have you been an attorney?

5 A Since 1999.

6 Q And what is the focus of your practice?

7 A The majority of my practice is criminal defense
8 work.

9 Q Okay. State or federal or both?

10 A Both.

11 Q And in that regard, have you had all manner of
12 cases from murders to traffic tickets?

13 A In terms of federal traffic tickets, no.

14 Q No. State.

15 A To clarify, I have not had a murder.

16 Q Okay. And do you recall being contacted by
17 someone associated with Mr. Morales back in August of
18 2008?

19 A Before I answer that, that's something that I
20 would like to get clarification from Judge Titus on. My
21 understanding -- and I did listen to the exchange. In
22 addition to the attorney/client privilege that you all
23 have discussed, my view is that in addition to the
24 attorney/client privilege, I have an ethical duty and
25 obligation with regard to attorney/client confidentiality

1 which I believe is more broad than any discussions that we
2 have had. And so to the extent that any information
3 relating to my representation of Mr. Morales is not
4 properly something that I should speak about absent a
5 court order.

6 THE COURT: With the consent of Mr. Morales.

7 THE DEFENDANT: The consent for Mr. Morales I
8 understand to be with regard to attorney/client privileged
9 communications. There's something broader than that with
10 respect to confidentiality irrespective of where that
11 information came from, whether or not it was from him or
12 not.

13 THE COURT: I'm not quite sure I know what you
14 mean.

15 THE WITNESS: Well, in terms of -- excluding
16 what any communications that my client and I have had,
17 there may be other matters that pertain to his
18 representation that still need to be maintained
19 confidential. I don't believe that he has or a client has
20 the right -- while they certainly have the right to waive
21 all attorney/client communication privileges, I still have
22 an obligation under the rules to not discuss his case,
23 even other aspects of his case, facts about his case that
24 maybe he didn't tell me, but that I have learned
25 throughout the course of --

1 THE COURT: Let's see what the question is and
2 see whether we have any issue at all. As I said, if I
3 understand what Mr. Proctor is saying, he's saying that
4 his client is not waiving attorney/client privilege with
5 respect to communication between the two of these people
6 and I'm not quite sure what the implications of that are
7 in terms of how much testimony you can get out of this
8 gentleman.

9 MR. PROCTOR: Yes, sir. And we will if it comes
10 up and, you know, if the Court finds it's a properly
11 privileged question, we want the answer to it.

12 BY MR. PROCTOR:

13 Q But my question was I believe do you recall
14 being contacted with regard to representing Mr. Morales in
15 August of 2008?

16 A I was hired in 2008 August.

17 Q And that was for a state case at that time?

18 A I don't believe it was a state case.

19 Q It was always federal while you were in it?

20 A I don't believe that he went to the county jail.
21 I think that he went to the Lavia Detention Center. Lavia
22 Detention Center in our county is where federally charged
23 defendants go. And in all honesty, I had not ever heard
24 your name until 3:25 on Wednesday. So you're asking me
25 questions about things that happened five years ago. I

1 don't know that at the time of Mr. Morales' arrest, it was
2 not going to be considered federal from the get-go. I
3 think he was arrested with more than six kilos of cocaine
4 which subjects him to the statutory mandatory minimums. I
5 don't think our local county police would have presumed
6 that it was going to be a state case. I think D.E.A.
7 would have taken it. But I don't know.

8 Q And do you recall -- you met with Mr. Morales.
9 Right?

10 A Yes. Of course.

11 Q And without saying what you said, more than
12 once?

13 A Yes.

14 Q And Ms. Ferko, she's the Assistant -- for the
15 benefit of the court reporter, F-E-R-K-O. She's the
16 Assistant United States Attorney, is she not?

17 A She is.

18 Q Who prosecuted Mr. Morales?

19 A Correct.

20 Q And you talked to her?

21 A Correct.

22 Q Is that fair to say? Special Agent Huling?
23 H-U-L-I-N-G.

24 A Correct.

25 Q Do you know him?

1 A I think his first name is Garrett.

2 Q Had cases with him before?

3 A I think so.

4 Q And there came a time when Mr. Morales sat down
5 with the agent and Ms. Ferko and others. Do you recall
6 that?

7 A When I was present, yes.

8 Q And there was a Mike Snyder there. Who is Mike
9 Snyder?

10 A I don't know.

11 Q So what is the practice in your district with
12 regard to -- well, first of all, let me ask a better
13 question. Do you know what a proffer letter is?

14 A Yes.

15 Q What is your understanding of what a proffer
16 letter is?

17 A Well, depending on where you are, some
18 jurisdictions call them queen for a day. We don't
19 necessarily use that. But I have a prosecutor from
20 Washington, D.C. that I'm working with that insists on
21 using queen for a day terminology. But in essence, there
22 is a document that is negotiated between the defense and
23 the prosecution with regard to possibly working out some
24 sort of plea agreement and, you know, certain things may
25 or may not come in later on. And there might be some

1 Castigar issues that have to be waived. But obviously,
2 they're different from jurisdiction to jurisdiction.

3 Q Well, I'm talking specifically in your
4 jurisdiction. Is there a typical proffer letter or do
5 they vary widely?

6 A Well, I think that the -- I don't remember who
7 the U.S. Attorney was at the time. Currently, the
8 administrator there is a gentleman named Terry Leonard.
9 I'm not certain if he allows his AUSAs some flexibility in
10 using idiosyncratic means at that time in '08. I'm not
11 sure if it was Mr. Leonard. So I would suspect that
12 Ms. Ferko probably used probably a typical boilerplate
13 with McAllen individuals.

14 Q And what rights on a -- someone talking with the
15 government does a boilerplate proffer confer upon them?

16 A I would have liked to have had a chance to look
17 at my files a little bit before I came up here today.
18 But --

19 Q Didn't we ask and you said you had your files?

20 A You sure did and we can get into that later if
21 you'd like. From my recollection, they are typically
22 short. Even our plea agreements in the McAllen division
23 are usually one page. They're not very lengthy. I think
24 a typical proffer letter in the -- to the extent that we
25 can call it a typical proffer letter in the McAllen

1 division would probably have the issues of independent
2 corroboration, some Castigar issues with regard to
3 information still being able to be used derivatively. You
4 know, just probably what -- my understanding is that you
5 have the typical one in your possession. So if you'd like
6 to show it to me --

7 Q I only have a typical Maryland one. I have yet
8 to see one from Texas.

9 A Okay.

10 Q And what protection is there for a defendant
11 other than for the statements he makes himself or herself?

12 A Well, I think obviously, when you ask what are
13 the protections, I mean to the extent that he's truthful,
14 he is protected from having that information strictly used
15 against him in a subsequent proceeding or typically in
16 that proceeding.

17 Q Okay. And if he's not truthful?

18 A Then it gets torn up, so to speak. He doesn't
19 enjoy the benefits of the protection.

20 Q So August 27, 2008, were you present at a
21 proffer?

22 A I don't have that date, but if there's a
23 document that says that that's where I was, yes. I
24 remember we had one. If it was the 27th or the 28th or
25 the 29th, I couldn't tell you. But if there's a report

1 that says 27th, then I was present. I wouldn't quarrel
2 with that.

3 Q It's my understanding. There were two. There
4 was one on the 27th and then the following day, Assistant
5 United States Attorneys from Maryland flew down on the
6 28th. Does that sound correct?

7 A If those are the dates. I mean I remember, I
8 remember some -- I remember that happening. But again if
9 you tell me it was the -- I'm not going to testify that I
10 remember it was the 26th versus the 27th versus the 28th.

11 Q It was five years ago. I'm not asking that.
12 Did you prior to this meeting ask for a proffer letter?

13 A Yes. And this is something that I wanted to get
14 Judge Titus to either order that I discuss because I think
15 we're getting into those issues that I do not want to
16 subject myself to disciplinary proceedings later on about
17 discussing a client's case openly. So --

18 THE COURT: Repeat your question, Mr. Proctor.

19 BY MR. PROCTOR:

20 Q Well, let me ask a better one. Did you ask
21 Ms. Ferko or anyone associated with the United States
22 Attorney's Office for a proffer letter for Mr. Morales?

23 A There was a discussion about it.

24 Q Okay. Can you go into that please?

25 A I don't think I can. No, sir. Unless I'm

1 ordered by the Court.

2 MR. PROCTOR: Judge, could you ask the witness
3 to answer the question?

4 THE COURT: If we're talking about a discussion
5 that he had with the U.S. Attorney's Office about a
6 proffer letter, I will instruct him to answer.

7 MR. PROCTOR: Thank you.

8 THE WITNESS: With regard to -- and again my
9 dates may be off, but what I can recall is that when we
10 went to the preliminary examination detention hearing,
11 Ms. Ferko approached me and as I'm sure you're aware of
12 the facts, prior -- well, at the time Mr. Morales was
13 arrested, he made some statements. Afterwards he made
14 some statements. And I'm not exactly sure how much time
15 elapsed from the time of his arrest to the time of my
16 hiring. But he did make statements prior to obtaining
17 counsel. And from what I remember, Ms. Ferko approached
18 me at the preliminary examination detention hearing and
19 said something like by the way, your guy -- again, this
20 was done by typical practice. At the preliminary
21 examination detention hearing, we are given the pretrial
22 service reports which will have the rudimentary
23 information, the basic stuff and then it will have the
24 criminal history, the assessment of factors of
25 nonappearance, danger to the community, that sort of

1 thing. And I remember she said look at your client's
2 criminal history sheet. It's -- I don't remember the
3 numbers. It was fifty some items long, three pages that
4 had to be stapled to back. She said obviously, being he's
5 not getting a bond and we know about the corrupt lawyer in
6 Maryland and he has given us so much she said B.S. or
7 something like that or garbage or B.S., that we are not
8 willing to work with him. So don't even think about it.
9 So that's my initial discussion with her if you want to
10 talk about a proffer letter.

11 Q Okay. So but she was willing to work with him,
12 right, because she sat down with him later?

13 A I was able to convince her to. Yes, sir.

14 Q And did you ask her and insist on a proffer
15 letter for that meeting?

16 A I asked her later. I don't know if was it the
17 next day. Again the timeline is skewed. But it was
18 probably when she mentioned to me about the corrupt lawyer
19 in Maryland, that was something that I was unfamiliar with
20 and so I went back and spoke to Mr. Morales and we had
21 discussions and then I went back to Ms. Ferko. But again
22 that's something that I'm not sure that we can clearly get
23 into absent some violations.

24 Q Okay. I believe you said yes when I asked if
25 you asked for a proffer letter. You did ask for one.

1 Right?

2 A I don't think I said that. I don't think I
3 testified to that.

4 Q Prior to the meeting on August 27th or you don't
5 recall the exact date. But late August 27, 2008, did you
6 ask for a proffer letter from the government?

7 A We had discussions about what Mr. Morales could
8 do for himself. In those discussions, my recollection is
9 that Ms. Ferko said something along the lines of and don't
10 even think that we're going to give you a deal. He needs
11 to give us something we can work with. And go back and
12 talk to your client. Again, and I'm paraphrasing and I
13 don't have that recollection.

14 Q I'm not asking for a deal. I'm asking was the
15 subject of a proffer discussed.

16 A I truthfully can't remember. If it was, she
17 would have told me hell no.

18 Q Well, you're surmising she would have told you
19 that. You don't know. Right?

20 A I don't recall.

21 Q I looked you up on PACER. You've had 60 or 70
22 federal cases over the years. Does that sound about
23 right?

24 A If you counted them.

25 Q And of those 60 or 70 clients, I'm sure many

1 have cooperated, right, or tried to?

2 A That's probably true.

3 Q And of those clients that cooperated or tried
4 to, almost all of them had a proffer letter. Right?

5 A Not really.

6 Q No?

7 A I've gotten 5K1's without a proffer letter, sir.

8 Q Why wouldn't someone ask for a proffer letter?

9 A Are you going to ask that generally global
10 question, why wouldn't someone ask?

11 Q Why wouldn't you want one?

12 A Well, you would always want one. In fact let me
13 back track. Would you always want one, I'm not sure. I
14 think that your notion of failing to have a proffer letter
15 by definition something that is erroneous or incompetent,
16 I take issue with that. I don't think that that is
17 accurate. I think there is a prominent lawyer here in
18 Maryland, that Robert Hasbib, something, that has written
19 about the pitfalls of proffer agreements. If I can
20 recall -- and again I haven't had much time to prepare for
21 today. But from the top of my head, I think that there is
22 quite a bit of literature that discusses that sometimes
23 the Federal Rules, specifically 410, sometimes offer a
24 defendant more protection than some proffer letters do.

25 So your question to me of why wouldn't somebody

1 ask for a proffer letter, I think has some implications
2 that or something that I don't agree with.

3 Q Well, let me ask a better question. Is it your
4 standard practice to request one when you take a client in
5 to talk to the government?

6 A I take every case on a case-by-case basis.
7 There's no standard way to do things.

8 MR. PROCTOR: Can I have a second please, judge?

9 THE COURT: Yes.

10 (Counsel conferred with his client.)

11 BY MR. PROCTOR:

12 Q Okay. While the proffer letter may not be
13 perfect, without a proffer letter, he's essentially
14 confessing. Right?

15 A He's confessing again?

16 Q Well --

17 A He had already confessed.

18 Q You went into a lot more detail at the two
19 meetings. You talked about things that were never
20 talked -- Rob Long never came up when he was arrested to
21 the best of your knowledge, did it?

22 A To the best of my knowledge, it did not. I
23 obviously wasn't there, as you know, when he was arrested.

24 Q You're aware we're here because we start trial
25 on Tuesday for the murder of Robert Long and that man is

1 charged with it.

2 A I didn't know that until you subpoenaed me two
3 days ago.

4 Q well, if you had returned my calls, you might
5 not have been here.

6 THE COURT: Mr. Proctor, don't argue with the
7 witness. Ask him a question.

8 THE WITNESS: I had never heard of you until
9 3:25 on Wednesday. I know you think you're famous, but I
10 had never heard of you.

11 BY MR. PROCTOR:

12 Q Check your cell phone messages.

13 A well, can't tell you -- can't tell you why I
14 never heard of you, but I haven't.

15 Q So do you recall the topic of Robert Long coming
16 up at the proffers?

17 A Not right now.

18 Q Do you recall the lawyer you mentioned whose
19 name is Stanley Needleman and that's all public record
20 being implicated in a murder?

21 A I remember. Yes. Like I said, it was five
22 years ago, but yes.

23 Q And to the best of your knowledge, that had
24 never come up before, had it?

25 A When he was arrested, did he say Stanley had

1 something to do with the murder, I don't think so.

2 Q And you recall Maryland being sufficiently
3 interested that two Assistant United States Attorneys
4 office flew down for the proffer?

5 A I do recall that. Yes.

6 Q And a Maryland agent flew down as well?

7 A That is true.

8 Q And all of this was made without the benefit of
9 a proffer letter, wasn't it?

10 MS. WILKINSON: I just object to the leading
11 nature.

12 THE WITNESS: I --

13 THE COURT: Hold, hold. Sir, don't talk.

14 MS. WILKINSON: Just to the leading nature of
15 the question.

16 THE COURT: Stop leading him and ask him a new
17 question.

18 MR. PROCTOR: Okay.

19 THE COURT: Sustained.

20 MR. PROCTOR: Can I have another second?

21 THE COURT: You may.

22 (Counsel conferred with his client.)

23 BY MR. PROCTOR:

24 Q And without a proffer letter, were there any
25 protections Mr. Morales was given in the room that day?

1 A Were there any protections he was given in the
2 room? I mean again I don't know that I can tell you what
3 he and I discussed.

4 Q About the use of his statements. Were his
5 statements protected in any way to your knowledge?

6 A I can't tell you what he and I discussed, sir.

7 Q I'm not asking what you discussed -- let me step
8 back a minute. You know what Miranda is. Right?

9 A Yes, sir.

10 Q Did anyone read him his Miranda rights that day?

11 A The day that we debriefed?

12 Q Yes.

13 A I couldn't remember. But again, I can't tell
14 you what he and I discussed. Even if they were -- I don't
15 remember if they were. But he and I would have had
16 discussions.

17 Q Okay. And I'm not asking what you discussed,
18 but what is your understanding of everything he said that
19 day. Did he have any protections for it at all?

20 A Did he have any protections? I think that he
21 did.

22 Q What were those?

23 A As long as he was truthful, he was going to be
24 protected.

25 Q Where was that reduced to writing?

1 A I don't know.

2 Q If I brought Ms. Ferko up here, if she want to
3 say if he told us the truth, we never would have used it?

4 A I can't tell you what Ms. Ferko would say. You
5 should know that.

6 Q Could Ms. Ferko bind the United States
7 Attorney's Office for the District of Maryland so that
8 they wouldn't use it?

9 A Say that again.

10 Q Can a prosecutor in Texas bind the United States
11 Attorney's Office in Maryland not to use a statement given
12 without the benefit of a proffer letter?

13 A I don't know.

14 Q Yes, you do.

15 MR. CLARKE: Objection.

16 THE COURT: Sustained.

17 MR. PROCTOR: That's all I have.

18 THE COURT: All right. Cross-examination.

19 MS. WILKINSON: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. WILKINSON:

22 Q Mr. Jarvis, would it help you to refresh your
23 recollection to look at the docket sheet in this matter in
24 terms of the dates and that sort of thing?

25 A Sure.

1 MS. WILKINSON: If I might mark as Government's
2 Exhibit 1, Your Honor?

3 THE COURT: You may.

4 BY MS. WILKINSON:

5 Q I'm going to give you a copy of the docket
6 sheet. And take a minute to look at it and put your mind
7 back to what happened in August of 2008. And would it
8 also refresh your recollection to look at Mr. Morales'
9 confession about what he was facing prior to coming into
10 the U.S. Attorney's Office for his debriefing?

11 A It would. Yes, ma'am.

12 MS. WILKINSON: Marking for identification, Your
13 Honor, Government's Exhibit 2. I have a copy for the
14 Court, Your Honor.

15 THE COURT: Okay. Thank you.

16 THE WITNESS: Thank you.

17 BY MS. WILKINSON:

18 Q So Government's Exhibit 1 for the record is just
19 a docket sheet off of PACER and Government's Exhibit 2 is
20 a series of paperwork related to the complaint,
21 Mr. Morales' Miranda in Texas and the statement he gave at
22 the time he was arrested. Do you see that there?

23 A Yes, ma'am.

24 Q Okay. So let's go back to the time that you
25 were retained by Mr. Morales to represent him. Just

1 putting in context, when did you enter your appearance in
2 Texas, Mr. Jarvis?

3 A I believe here according to the docket sheet, it
4 was August 21st.

5 Q August 21, 2008. And I presume that you had
6 already met with Mr. Morales and you came into enter your
7 appearance officially for him on that day. Is that
8 correct?

9 A That is correct. Yes, ma'am.

10 Q Again refreshing your recollection with the
11 paperwork, can you tell for the record, when Mr. Morales
12 was arrested?

13 A It appears that he was arrested on -- well, the
14 Attachment A says August 15, 2008 at approximately 3 p.m.

15 Q Okay. Now I assume prior to August 15, 2008,
16 you had never heard of Jose Morales?

17 A That is true.

18 Q So the timeframe that we're now dealing with
19 sometime after August 15, 2008 and up to the time you
20 entered your appearance and then continuing after with the
21 debriefing. Is that fair to say?

22 A That is. Yes, ma'am.

23 Q And did there come a time when and just to kind
24 of close the loop, Mr. Jarvis, when you were fired by
25 Mr. Morales or let go, so to speak?

1 A Yes, ma'am. And I see here on the docket sheet
2 that I filed a motion to withdraw on September 15, 2008
3 and so that means it would have been prior to me filing
4 that. So I probably represented him for a couple of
5 weeks.

6 Q So a couple of weeks later that he had new
7 counsel retained for himself. Correct?

8 A Yes, ma'am.

9 Q So let's go back. When you go enter your
10 appearance in federal court, did the prosecutor provide
11 you a copy of Mr. Morales' complaint and the Miranda
12 statement that he had made?

13 A I'm sure she did. I don't specifically -- I
14 don't specifically remember, but I recognize these
15 documents. So I'm sure she did. Yes.

16 Q So you had known at some point that Mr. Morales
17 had already received this Miranda warnings and had
18 provided a significant eye opening statement, if you will,
19 with regard to his own culpability and the culpability of
20 an attorney here in Maryland. Correct?

21 A I knew that. Yes, ma'am.

22 Q So if we look at the actual statement itself,
23 Mr. Morales confessed on August 14th to his name, his
24 address, obviously that. And the first sentence he states
25 is that "last week, I flew down under the directions of my

1 attorney, Stanley Needleman, to meet with a male subject
2 known to me as Raoul to set up the transportation of ten
3 kilograms of cocaine from the Rio Grande valley to
4 Baltimore, Maryland with a possibility of 30 kilos in the
5 near future." Have I read that right?

6 A Yes, ma'am.

7 Q So it goes on to talk about Mr. Morales'
8 involvement in drug trafficking which frankly doesn't
9 sound, Mr. Jarvis, would you agree with me is not all that
10 significant?

11 A The six to ten kilos?

12 Q As a routine drug case in McAllen?

13 A I have had cocaine cases much larger. Yes.

14 Q So right now, we're looking at the information
15 that Mr. Morales provided and the interest, if you will,
16 is the fact that it was an attorney up here in Baltimore
17 who was involved in drug trafficking, that fact was not
18 routine or usual. Would you agree with me?

19 A I would agree that that's what would jump out.
20 Yes, ma'am.

21 Q So going back to the docket sheet, when exactly
22 did you have the detention hearing for Mr. Morales?

23 A That would be -- I believe it was 8-21-08.

24 Q And on that 8-21-08, is that the -- had
25 Mr. Morales received his initial appearance?

1 A Yes.

2 Q Okay. And at his initial --

3 A That it would have been a few days before.

4 Q Right. A few days before. And at his initial
5 appearance, at that time based on your training and
6 experience as a lawyer, had Mr. Morales been in front of a
7 United States magistrate judge?

8 A Yes, ma'am. It indicates here he was in front
9 of --

10 Q Had you represented clients in initial
11 appearances before a United States magistrate judge in
12 Texas?

13 A Yes. But it's usually pretty quickly after
14 you're hired. It happens quickly. But yes.

15 Q During that initial appearance proceeding, is it
16 the practice of a United States magistrate and you can
17 look at the docket sheet to refresh your recollection, to
18 further advise the defendant of his rights?

19 A They are advised. Yes, ma'am.

20 Q And do those rights include the right to an
21 attorney?

22 A Yes, ma'am.

23 Q And do those rights include the right to remain
24 silent?

25 A Yes, ma'am.

1 Q And do those rights include the fact that what
2 you say may be used against you?

3 A Yes, ma'am.

4 Q And that's all told to a defendant by someone
5 sitting on a bench like Judge Titus here in open court?

6 A It is.

7 Q So now this would be, count with me, the second
8 time that Mr. Morales was advised of his rights. Correct?

9 A That would be. Yes, ma'am.

10 Q Now you at that time you testified on direct
11 that you had a conversation with Ms. Ferko during the
12 detention hearing. Correct?

13 A Prior to. Yes.

14 Q And at that time she advised you of the pretrial
15 report I guess --

16 A Presentence report.

17 Q Exactly. About his criminal history. Correct?

18 A Yes, ma'am.

19 Q And Mr. Morales was no stranger to the criminal
20 justice system?

21 A It did not appear so.

22 Q And is it fair to say that he had been arrested
23 many times?

24 A That is true.

25 Q And Ms. Ferko was drawing that to your attention

1 because in her view this wasn't going to be a bond case.
2 Correct?

3 A That is correct. It would have been a
4 presumption case anyway. But right.

5 Q And we knew already at this point, did we not,
6 Mr. Jarvis, that Mr. Morales had been arrested in a prior
7 private airport? Yes?

8 A Correct.

9 Q Charter a plane back to Baltimore? Yes?

10 A Yes.

11 Q With a large amount of cash? Yes?

12 A Yes, ma'am.

13 Q With six kilograms of cocaine and a bag in the
14 bathroom?

15 A That is true.

16 Q And in your training and experience as a defense
17 attorney down in Texas, Mr. Morales with his criminal
18 history, a confession that had been Mirandized and the
19 significance of the evidence, he was in a lot of trouble.
20 Correct?

21 A He was facing an uphill battle. Absolutely.

22 Q And as a defense attorney, often when there is
23 something unusual, information that a defendant can
24 provide such as a corrupt attorney, that is something that
25 a defendant might be able to do to help himself out of his

1 predicament. Correct?

2 A That is true.

3 Q And it's fair to say -- I'm not asking you now,
4 although perhaps I think it's relevant to this inquiry,
5 but Mr. Miranda wanted to help himself out of his
6 predicament? Yes?

7 A That was the plan. Yes, ma'am.

8 Q And in fact, Ms. Ferko told you she wasn't
9 really interested in anything that he had to say. But do
10 you recall that perhaps people in Maryland might be?

11 A Yes, ma'am.

12 Q And is that in fact the reason why some
13 Assistant U.S. Attorneys and agents from Baltimore flew
14 down for that debriefing?

15 A That would be true.

16 Q And is it fair to say that Ms. Ferko, and I am
17 asking your best recollection, might have said words like
18 I really don't care what Mr. Morales has to say, this is a
19 routine drug case, but if he can help himself out with
20 these attorneys, bring him in?

21 A And she probably threw in an expletive, but yes.

22 Q And Mr. Morales wanted to help himself out of
23 this predicament, let there be no mistake about that.
24 Correct, Mr. Jarvis?

25 A That is correct.

1 Q So when you bring a client in whether or not
2 it's with a proffer agreement or not for a debriefing, do
3 you advise them generally, it's not a good idea to lie to
4 the government?

5 MR. ZUCKER: Objection. Relevance.

6 THE WITNESS: I always tell them that.

7 BY MS. WILKINSON:

8 Q I'm sorry. I didn't hear you.

9 MR. ZUCKER: Objection.

10 THE WITNESS: I always tell them that.

11 THE COURT: I can't hear what the witness is
12 saying. Say it again, sir.

13 THE WITNESS: I always tell them to be truthful.
14 Yes, ma'am.

15 THE COURT: Okay.

16 BY MS. WILKINSON:

17 Q And when you tell them to be truthful, is the
18 reason for that because if they lie, whether or not they
19 have a proffer agreement, all bets are off with the
20 government?

21 A Absolutely.

22 Q They ruin their credibility.

23 A They can.

24 Q And in this case we're dealing with him
25 testifying possibly against a lawyer in Baltimore. Yes?

1 A Correct.

2 Q And would you agree with me the stakes are even
3 higher to be truthful?

4 A Absolutely.

5 Q So we go to -- we go to the detention hearing.
6 We have conversations I believe you testified on direct
7 back and forth with Mr. Morales and the decision is made
8 that Mr. Morales is competent for his debriefing.
9 Correct?

10 A Yes, ma'am.

11 Q And you mentioned on direct that you recall him
12 talking about a murder during his debriefing. Yes?

13 A Yes, ma'am.

14 Q And in that murder -- I know you haven't had
15 much chance to prepare today -- Mr. Morales was not saying
16 that he was involved in the murder, was he?

17 A No, ma'am, he did not.

18 Q Mr. Morales was putting Mr. Needleman in a
19 murder. Correct?

20 A Correct.

21 Q So at the time Mr. Morales was giving his
22 debriefing, it was to talk about someone else being
23 involved in a murder. Correct?

24 A He never said he was involved in the murder.

25 Q And when he was first interviewed by I.C.E. on

1 August 14, 2008, the attorney he spoke about was Stanley
2 Needleman. Correct?

3 A True.

4 Q And the attorney that was involved in the murder
5 that he told the police about was Stanley Needleman.
6 Correct?

7 A True.

8 Q He didn't put himself in that. Correct?

9 A Correct.

10 Q Now the debriefings that happened over a period
11 of time, they were with yourself. Correct?

12 A Yes, ma'am.

13 Q Federal agents. Correct?

14 A Yes, ma'am.

15 Q Ms. Ferko. Correct?

16 A Yes, ma'am.

17 Q Some Assistant U.S. Attorneys from Maryland.
18 Correct?

19 A Yes, ma'am.

20 Q At periods of time. Yes?

21 A I think that's right. Yes.

22 Q And during all that time, did anybody hurt or
23 touch Mr. Morales?

24 A No, ma'am.

25 Q Did anybody threaten him?

1 A No, ma'am.

2 Q Did anybody say Mr. Morales, you have to tell us
3 this or, you know, we're going to put you in solitary
4 confinement?

5 A No, ma'am.

6 Q Did they threaten him, intimidate him in any
7 way?

8 A They never threatened him.

9 Q Why don't you give the judge your best
10 recollection of how Mr. Morales' demeanor was in the
11 course of these debriefings?

12 A Mr. Morales is actually a highly intelligent
13 individual. I would say in terms of my clients, he's at
14 the top in terms of intellectual capability. He's a sharp
15 individual. I didn't understand him to be threatened or
16 felt threatened or scared. He was certainly facing some
17 serious charges. But based on our conversations, I didn't
18 interpret his demeanor to be that of someone who is
19 frightened beyond obviously being charged with a crime.

20 Q Is it fair to say they didn't have to pull very
21 many teeth, so to speak, to get Mr. Morales to talk about
22 Mr. Needleman?

23 A That's fair.

24 Q He was there to talk about Mr. Needleman?

25 A Correct.

1 Q In fact Mr. Needleman's name was mentioned many
2 times in that debriefing. Yes?

3 A True.

4 Q That was the purpose of the debriefing so
5 Mr. Morales could rat on his lawyer. Yes?

6 A So he could provide information that would be
7 helpful to the government.

8 Q With the expectation that it might help him out
9 of the predicament that he was in. Yes?

10 A Absolutely.

11 Q And again you had talked on direct with Mr.
12 Proctor about what the practice is down in Texas if
13 Mr. Morales would be able to provide such important
14 information in a case that could, you know, make a dirty
15 lawyer stand trial for very significant drug charges. And
16 in your opinion, Mr. Jarvis, if Mr. Morales had been
17 truthful during those proceedings, if he had helped and
18 told the truth about Mr. Needleman, would Ms. Ferko have
19 worked out a 5K with you?

20 A I would have no doubt in my mind.

21 MR. ZUCKER: Objection.

22 THE COURT: Overruled.

23 BY MS. WILKINSON:

24 Q Yes?

25 A I have no doubt in my mind.

1 Q But he didn't. He lied. Correct?

2 MR. ZUCKER: Objection. Asking this witness to
3 comment on another witness' credibility.

4 THE COURT: Sustained.

5 MS. WILKINSON: Withdrawn, Your Honor.

6 BY MS. WILKINSON:

7 Q I'll ask it this way. Is it fair to say you
8 were told that the agents and the prosecutors did not
9 believe Mr. Morales?

10 A I need to be clear. I was fired probably prior
11 to them coming to whatever conclusions they had.

12 Q Very well. Let me ask you this. In the time
13 that you've prepared your -- that you were subpoenaed to
14 come here to court today, have you had the chance to
15 review Mr. Morales' own statements about his debriefings
16 during his sentencing hearing in front of the judge down
17 in McAllen, Texas? Have you reviewed those?

18 A Yes, ma'am.

19 Q And did you see in those admissions that
20 Mr. Morales made --

21 MR. PROCTOR: Judge, we would object. If Ms.
22 wilkinson wants to admit the --

23 THE COURT: Overruled. It's fair
24 cross-examination.

25 BY MS. WILKINSON:

1 Q Is it fair to say, Mr. Jarvis, that Mr. --
2 according to the transcript that Mr. Morales told the
3 court in Texas, yes, "I told her everything" -- meaning
4 the AUSA -- "I did tell some lies in the beginning with my
5 first attorney who gave me some very bad advice. The
6 Court: Uh-huh. The defendant: And he told me to make up
7 a story, a big story if I wanted a bail and that's what I
8 did." Did you read that in the transcript, Mr. Jarvis?

9 A I did read that. Yes, ma'am.

10 Q So I have to ask you. Did you tell Mr. Morales
11 to make up a big story?

12 A No, ma'am.

13 Q Did you tell him if he made a big story, he
14 would get out on bail?

15 A No, ma'am.

16 Q Did you tell Mr. Morales that if he told a big
17 whopper about his lawyer, that he would be able to walk
18 out of prison that day?

19 A Of course not.

20 Q Did you tell him not to lie?

21 A I sure did.

22 MS. WILKINSON: I'm just checking my notes, Your
23 Honor.

24 BY MS. WILKINSON:

25 Q Is it your understanding Mr. Morales didn't get

1 a 5K, Mr. Jarvis?

2 A It's my understanding the he did not.

3 Q So the only issue with respect for the court to
4 resolve was whether or not Mr. Morales was a career
5 offender?

6 A I didn't read that far into his sentencing
7 transcript.

8 MS. WILKINSON: Okay. Fair enough.

9 THE COURT: Any redirect?

10 REDIRECT EXAMINATION

11 BY MR. PROCTOR:

12 Q I just want to make sure the record is clear.
13 As well as receiving a subpoena for your presence, you
14 received a subpoena duces tecum to bring your file. Isn't
15 that correct?

16 A That is true.

17 Q And do you have one?

18 A I do not.

19 Q Neither electronically nor paper?

20 A No, sir.

21 Q Is there any reason for that?

22 A Yes.

23 Q Do you shred them? Do you give them to the next
24 attorney? why don't you have one I guess is my question.

25 A Say that last part.

1 Q why don't you have a file?

2 A When I'm looking at these dates, what I am
3 piecing together is he was arrested, Mr. Morales was
4 arrested the middle of August 2008. My former law partner
5 and I divorced, so to speak, August 1, 2008. And in that
6 divorce, he got the building and the secretaries and the
7 computers. So I'm piecing things together. I think that
8 probably what would have happened is this was the time
9 that I was moving offices. I was retained for less than
10 two weeks. I just -- I don't know.

11 When I got your subpoena, I did drive to my
12 warehouse where I keep boxes of closed files so that I
13 could testify that I did look for it. I didn't find one.
14 So I'm presuming that after a two-week representation, the
15 file might have been thin in terms of not being as
16 voluminous as other files that we close out and maybe just
17 got -- failed to be filed or closed out. There weren't in
18 any of the closed out files.

19 Q Now Ms. Wilkinon showed you the statement that
20 Mr. Morales made, but didn't sign. Do you still have it
21 up there, sir?

22 A I do, yes. Yes, sir.

23 Q And at the top, it says Hidalgo County Sheriff's
24 Office. Right?

25 A It does.

1 Q So does that indicate to you that it started off
2 as a state case?

3 A Not really. I mean the Hidalgo County Sheriff's
4 office has a what we call a High Intensity Drug
5 Trafficking, you know. Obviously, there is a county or
6 state component to it. Very oftentimes in our
7 jurisdiction a local police officer may make a routine
8 stop and find significant amount of marijuana or cocaine
9 in the car. Just because it was an initial stop made by a
10 local or municipal non-federal agency doesn't mean that
11 they get to keep the case.

12 And so I don't know what the inter-agency
13 agreements are. I don't know if there's a threshold
14 amount in terms of money or narcotics. But it is often
15 the case that in seizures in our jurisdiction, that it is
16 not strictly a federal arrest. There might be different
17 agencies involved. But I just don't think that anybody
18 that practices in our jurisdiction would expect that a
19 six-kilogram of cocaine case at a private airport would
20 have been a local crime.

21 Q And would you agree with me and take a moment
22 and read that statement if you need to, there was no
23 mention of the murder of Robert Long in Mr. Morales'
24 initial statement?

25 A That is true.

1 Q There is no mention of a murder of anyone, is
2 there?

3 A That is true.

4 Q Now this meeting that happened and you don't
5 recall the exact date, but the end of August or the two
6 meetings at the end of August, where were they?

7 A They were on the sixth floor of the Benson Tower
8 which is where we have our federal courts and the United
9 State's Attorney's Office.

10 Q Is the sixth floor occupied by the U.S.
11 Attorney's Office?

12 A It is.

13 Q And so it's at the U.S. Attorney's Office. And
14 to the best of your recollection, were you there
15 throughout?

16 A I believe so. Yes, sir.

17 Q And was there a time you were present by
18 telephone only?

19 A If it is documented as such, then that may be
20 true.

21 Q I don't believe it's documented either way. I'm
22 asking what your recollection is.

23 A I don't know. There have been cases where for
24 scheduling reasons, if I need to drive to another hearing,
25 I will be on my car phone and listen to it. I don't know

1 if that happened with Mr. Morales. But I wouldn't dispute
2 that if somebody says that necessarily.

3 Q Okay. And again, you don't have the benefit of
4 seeing this, but if the agents' notes that say represented
5 by Eric Jarvis and Mike Snyder, you don't know who Mike
6 Snyder is?

7 A No, sir.

8 MR. PROCTOR: May I have a second, please,
9 judge?

10 (Counsel conferred with his client.)

11 BY MR. PROCTOR:

12 Q That's a good question. When you weren't
13 available, let's say you had court or a jail visit that
14 couldn't wait, we're just trying to -- maybe it was the
15 agent wrote the name down wrong. Was there anyone else
16 who would cover for you if a proffer had to happen and you
17 couldn't be there?

18 A I don't believe so.

19 MR. PROCTOR: And, judge, I guess -- can we have
20 this marked as Defendant's 1 for identification only?

21 BY MR. PROCTOR:

22 Q I'm showing you, sir.

23 MR. PROCTOR: Judge, I always forget. May I
24 approach the witness, please?

25 THE COURT: You may.

1 MR. PROCTOR: Just shout at me if I forget.

2 THE COURT: I'm not fussy about things like
3 that.

4 BY MR. PROCTOR:

5 Q This is the notes of the proffer that occurred.
6 Do you see the date on the top right corner, sir, as being
7 August 27th?

8 A Yes, sir.

9 Q And to the left underneath the word, debrief, it
10 says rep by Eric Jarvis and Mike Snyder?

11 A Yes, sir.

12 Q And there's a phone number listed. Is that your
13 phone number?

14 A That is still my phone number today. Yes, sir.

15 Q And the phone number listed for Mike, do you
16 recognize that phone number?

17 A I don't.

18 Q So but as you sit here today, you don't recall
19 one way or the other whether you were present in person or
20 present by phone. Is that fair to say?

21 A I remember being present in person. I don't
22 know if I had to leave if that's somebody saying that.
23 But I remember sitting there.

24 Q So you know you were there for at least some of
25 it. Is that fair?

1 A Yes.

2 Q And it was a -- if I tell you it was a two-day
3 briefing, do you know that you were there for both days
4 for at least part of it or you just --

5 A I don't recall.

6 MR. PROCTOR: Okay. I have --

7 THE COURT: All right. The witness may step
8 down.

9 MR. ZUCKER: One second, judge. Moment to
10 consult.

11 (Counsel conferred.)

12 MS. WILKINSON: Just to make sure the record
13 is --

14 THE COURT: Wait. They may have another
15 question.

16 MS. WILKINSON: Oh, I'm sorry, Your Honor.

17 MR. PROCTOR: That's all I have for this
18 witness.

19 THE COURT: All right. What did you say, Ms.
20 wilkinson?

21 RECROSS-EXAMINATION

22 BY MS. WILKINSON:

23 Q Mr. Jarvis, just to clarify for the record, is
24 it fair to say you specifically recall being present for a
25 debriefing of Mr. Morales?

1 A Yes.

2 Q And at that debriefing, Mr. Morales was present?
3 Yes?

4 A Yes, ma'am.

5 Q The Assistant U.S. Attorney Ferko?

6 A Yes, ma'am.

7 Q Did you meet the prosecutors from the U.S.
8 Attorney's Office in Maryland?

9 A I think I did. Yes.

10 Q And the various agents that were there?

11 A Yes, ma'am.

12 Q And you have a recollection of that?

13 A I do.

14 MS. WILKINSON: Nothing further.

15 THE COURT: All right. The witness may step
16 down. Thank you very much, sir.

17 THE WITNESS: And may I be excused --

18 MR. ZUCKER: Quick moment to consult, judge.

19 REDIRECT EXAMINATION

20 BY MR. PROCTOR:

21 Q Sir, could you describe the agents? How many,
22 male, female, white, black, Hispanic?

23 A Not right now.

24 MR. PROCTOR: That's all I have.

25 THE COURT: All right. The witness may step

1 down. You may return to Texas.

2 THE WITNESS: Thank you very much.

3 THE COURT: Thank you very much.

4 MR. PROCTOR: Judge, can I just have a witness
5 voucher for the witness? I just want to --

6 THE COURT: Can you what?

7 MR. PROCTOR: The witness is entitled to a
8 voucher. I just want to talk to him for one second about
9 that.

10 THE COURT: You may.

11 (Pause.)

12 MR. PROCTOR: Thank you, judge.

13 THE COURT: All right. I'll hear argument on
14 the motion.

15 MR. PROCTOR: Can I have a second to consult?

16 (Counsel conferred with his client.)

17 MR. PROCTOR: I'm glad he's left the room.
18 Judge, I mean it's our position that it's per se
19 ineffective to not protect the client. We cited a case --

20 THE COURT: Help me out with one thing because
21 you are making an argument based on very, very, very
22 little authority that I'm aware of.

23 MR. PROCTOR: Correct. And I have it up on
24 the --

25 THE COURT: Let me start with two things. First

1 of all, you got Miranda. Miranda establishes an
2 exclusionary rule which precludes the introduction of
3 evidence for the public policy reason of trying to
4 discourage or prohibit improper government conduct in
5 violation of someone's constitutional rights. That's a
6 well-known, well established rule. We're all familiar
7 with that. You are trying to take a Strickland-type
8 theory to something that happened in another state, in
9 another case and say the lawyer was incompetent.

10 Now my understanding of Miranda is not that the
11 Supreme Court is saying not only do you have to advise
12 them of their right to counsel, meaning the detective, but
13 you also need to make it happen and you need to make
14 certain that the person is competent and if you don't,
15 that's government misconduct that can result in exclusion.
16 I am lost on how that can be the case.

17 Where is there misconduct in violation of
18 constitution by a government official on that side of the
19 table present in this case that would justify exclusion of
20 statements made when he was represented by counsel in
21 another proceeding in another state? How does that get
22 back to the exclusionary rule?

23 MR. PROCTOR: That's not what we're saying,
24 judge. I go to trial. My client says there are three
25 people that can tell you I was 30 miles away drinking Pina

1 Coladas at the time of the crime. I never talked to them.
2 I never subpoenaed them. That case would still get
3 reversed and the government didn't do a darn thing wrong.
4 They didn't know those people existed. You have a right
5 to an attorney. If that right is to have any teeth, your
6 attorney should be awake, seeking to enforce your right.

7 THE COURT: Well, this is a proceeding that is
8 just beginning and we're talking about the lawyers in this
9 case. That's you and your colleague today, Mr. Zucker.

10 MR. PROCTOR: We are not just talking about
11 that. We are talking about a statement the government
12 seeks to introduce that will be part and parcel of closing
13 argument --

14 THE COURT: What prophylactic purpose is there
15 in punishing government misconduct by excluding it? What
16 is the rationale for excluding it?

17 MR. PROCTOR: Again, we're not looking to punish
18 the government. We're not faulting the government. Ms.
19 Ferko it sounds like did what she was supposed to do. But
20 you're also charged with protecting the rights of this
21 defendant.

22 THE COURT: But why should exclusion be the
23 appropriate remedy if any for what you're describing?

24 MR. PROCTOR: As opposed to going up on direct
25 appeal after we have this long trial and you can't raise

1 ineffectiveness there and then we come back on 2255. You
2 know what he's going to say. You've already heard it.
3 That statement if it's material procured without the
4 effective assistance of counsel will just lead it to be
5 reversed --

6 THE COURT: Well, it wasn't procured in
7 violation of his right to counsel. The magistrate judge
8 furnished him with a lawyer.

9 MR. PROCTOR: Without effective assistance of
10 counsel.

11 THE COURT: Okay. All right. Any further
12 argument? I'd like to hear from the government.

13 MR. PROCTOR: No, sir.

14 THE COURT: Okay.

15 MS. WILKINSON: Your Honor, obviously we
16 disagree with any finding that Mr. Jarvis was incompetent.
17 He was in this case for three weeks and it's clear from
18 his cross-examination and his direct that this was a
19 client who wanted to come in and talk about Mr. Needleman.
20 He saw a window of opportunity and that's what he was
21 going to drive a truck through. And he admitted that he
22 lied which is the most important thing at the end of the
23 day, Your Honor.

24 Because whether or not Mr. Jarvis is a potted
25 plant sitting there and he wasn't. It's very clear that

1 he wasn't. He's a busy practitioner in a high active drug
2 practice where he comes in and he represents some guy for
3 three weeks who has a terrible criminal history, who's
4 already confessed and now he wants to come in and talk
5 about his lawyer.

6 So Mr. Jarvis got him the opportunity to appear
7 before that AUSA, an AUSA who really wasn't interested in
8 him otherwise and let him come in and talk about that
9 lawyer. And the statement that he gave is not true.

10 So whether or not Mr. Jarvis was -- if nobody
11 was there or if the government promised not to use
12 truthful information against him makes no difference in
13 this case. Because at the end of the day, the analysis is
14 an easy one. Mr. Morales told the judge that he lied in
15 those statements. And it's the statement that he makes
16 about Mr. Needleman related to this murder that he does
17 not implicate himself in, does not implicate himself in
18 that the government seeks to use in this case. And it's
19 very clear there's no Miranda warning at all for the
20 reasons that the Court just analyzed.

21 THE COURT: All right. Anything further.?

22 MR. PROCTOR: No, sir.

23 THE COURT: All right. I'm going to deny the
24 motion. First of all, I found the witness in front of me
25 to be credible. He was given the statement made by

1 Mr. Morales at his sentencing about being -- allegedly
2 having told this witness to make up a story and denied
3 that. I find that denial credible. Any officer of the
4 court telling a client to make up a story is not going to
5 have a very long career.

6 It is apparent from the totality of his
7 testimony that Mr. Morales was very anxious to spin a tale
8 about misconduct by his then Maryland lawyer in order to
9 help him out of a great big predicament he was in. I
10 don't find anything said or done by this lawyer in Texas
11 was below the Strickland standards of representation of
12 this client. This was a client that was very articulate.
13 He indicated he was one of the smartest clients he had,
14 very much wanting to manage the ship of state in terms of
15 his representation. And I don't find that there was any
16 deficiency in his representation. Rather he had a client
17 who wanted to tell a tale and ultimately admitted at his
18 sentencing that he had told a tall tale and tried to put
19 the blame on this lawyer. And I found this lawyer's
20 denial of the suggestion that he had told Mr. Morales to
21 make up a tall tale, I find this lawyer to be credible and
22 I find it incredible that this lawyer instructed him to
23 make up this tall tale. So the motion is denied.

24 All right. We now have -- well, the one that
25 may be something more significant to take on is the

1 government's motion in limine to admit deceiving
2 statements, Number 57. Let me hear the government's
3 argument on that.

4 MS. WILKINSON: I don't --

5 THE COURT: I haven't seen any response to that.
6 Is there a response to that?

7 MS. WILKINSON: Not a written response, Your
8 Honor. And I had spoken briefly to counsel beforehand and
9 I don't know what their objection of the law is fairly
10 clear that if the Court finds that Mr. Morales was
11 involved in making sure that Mr. Long was not available as
12 a witness, that statements, relevant statements that
13 Mr. Long made are admissible --

14 THE COURT: Assuming an adequate evidentiary
15 foundation is made at trial, I think the law you cited is
16 correct.

17 MS. WILKINSON: Exactly, Your Honor.

18 THE COURT: The question, of course, would be
19 whether that adequate evidentiary foundation is laid. So
20 we'll have to cross that bridge when we get to it. But I
21 will grant the government's motion without prejudice to
22 your right to object if you don't think the adequate
23 foundation has been laid.

24 MR. PROCTOR: Well, yes, judge. I guess our
25 point is and the case law says the judge doesn't have to

1 hear the testimony outside the presence of the jury. But
2 there is certainly no reason to prohibit it. Obviously,
3 if the government gets up in opening statement and says
4 this is what Mr. Long is going to say, you're going to
5 hear from Mr. Long, he was in a videotaped statement. He
6 said X, Y and Z. He was a witness. That's why he was
7 killed. I think is it Jiles, the Supreme Court case? You
8 know, we can't unring that bell later. And so best
9 practice I believe would be to put witnesses on before we
10 have opening statement so that the government can show
11 through hearsay and an agent. And I'm not suggesting we
12 put every witness on that may have a statement to link the
13 murder, not so much the murder, but for the purpose of the
14 government demonstrating to this Court that the killing
15 was specifically designed to prevent him from testifying
16 against Mr. Morales, which is the test. People kill
17 people for all sorts of reasons every day. None of which
18 gets their statements in. It has to be --

19 THE COURT: well, I have been painfully made
20 aware of because of all the pretrial statements in this
21 case and the statements and the documents and so forth
22 that the government's theory and they have numerous
23 witnesses I assume who will be here to demonstrate the
24 validity of this theory is that he became aware through
25 Mr. Needleman of his co-defendant cooperating and there's

1 a conflict between your client and Mr. Needleman as to
2 what was said and who said it. But at least from the
3 standpoint of Mr. Needleman, that he was going to take
4 care of it. And the government intends to offer evidence,
5 other evidence that shows that that's exactly what he did.

6 MR. PROCTOR: And again, we think the Court
7 should hear it outside the presence of the jury so that it
8 can decide it.

9 THE COURT: Well, it seems to me, it's a matter
10 of timing, not so much as outside the presence of the
11 jury. I can't tell the government exactly how to put its
12 case on. But it would seem to me that testimony as to the
13 statements made by Mr. Long should come a little farther
14 into the case after I've heard the other testimony that we
15 just alluded to, rather than have it outside the presence
16 of the jury. I don't want to get this case into a
17 six-week trial.

18 MS. WILKINSON: Your Honor, first of all, I
19 don't think that that is what is required and we would --
20 I'm not sure. I have to look at my trial order of proof
21 whether or not we intended to call the several witnesses
22 that to whom Mr. Morales made --

23 THE COURT: Maybe calling them a little later
24 case. Maybe not the first week. But the second week,
25 allow you to put on the witnesses that would set up the

1 evidentiary foundation to show that Mr. Morales was
2 intending to have that happen. So therefore, the
3 statements by Mr. Long could come in.

4 MS. WILKINSON: Your Honor, I do not have that
5 in our order of proof just because it doesn't make sense
6 chronologically for the jury. And if the Court would hear
7 me out about that? I would like to proceed by proffer
8 because it's not just Mr. Needleman who is going to
9 testify about statements that Mr. Morales made
10 incriminating himself in this murder. There are several
11 witnesses who are going to testify about that.

12 In my experience before Judge Chasanow in the
13 Gray case as well as the other cases cited in our brief is
14 that it's not required to do it in the order that the
15 Court suggests. That a proffer by the government with the
16 punishment that if we don't link it up and don't prove it
17 up, that all that evidence gets stricken.

18 Because Mr. Long had talked to several people
19 about his cooperation and his fears, it's kind of hard to
20 extricate it that way. But I will proffer to the Court
21 that in addition to Mr. Needleman, Mr. Morales made
22 incriminating statements to another correctional officer
23 who's coming in to testify regarding the murder of
24 Mr. Long as well as to cooperating witnesses, inmate
25 witnesses to whom he made jailhouse conversations. And

1 most of the trial will be made corroborating those
2 witnesses statements about what Mr. Morales said. And I'm
3 happy to write it down for the Court before we start so
4 that you have what our purported testimony will be about
5 that. But I don't think it's required under the law for
6 us to re-do our order of proof.

7 THE COURT: I wasn't saying that. I was talking
8 in terms of whether any preliminary showing needs to be
9 made outside the presence of the jury. I'm not so sure
10 that that's required at all.

11 MS. WILKINSON: Right.

12 THE COURT: But to the extent that it is, it
13 could readily be solved by having some preliminary
14 testimony before you put in the statements of Mr. Long.

15 MS. WILKINSON: I will certainly consider
16 calling one of the witnesses. He's coming from out of
17 state. He's the Correctional Officer Pabon --

18 THE COURT: well, based on the government's
19 representations in its motion as to what it intends to
20 prove, I'm going to grant the motion and allow you to
21 admit Mr. Long's statements. But I believe in fairness to
22 the defendant, I would like to see some testimony that
23 shows the existence of a basis for this coming in before
24 Long's statements actually come in. Not a lot. I mean I
25 don't need to have you completely put upside down your

1 order of your proof. And it seems to me from what you've
2 told me that it won't take too many witnesses before
3 there's an evidentiary basis for putting in Long's
4 statements based upon what you proffered to me.

5 MS. WILKINSON: Your Honor, two comments about
6 that just to make sure I understand the Court's analysis
7 here. We had intended to start the trial with the
8 evidence about the murder and then talk about the motive
9 behind the murder, which does include statements that
10 Mr. Long made and then our witnesses related to the
11 statements that come later.

12 I will tell you this, Your Honor. The three
13 witnesses have all been in the grand jury and testified
14 under oath about the statements that Mr. Morales made to
15 them. So the three witnesses have all testified. I'm
16 happy to pull those excerpts out for the Court. They've
17 obviously been provided to the defense and I would proffer
18 that their testimony is going to be similar.

19 THE COURT: You've got three witnesses who went
20 in the grand jury who would provide the basis for this
21 coming in under the evidentiary rule. I understand that.

22 MS. WILKINSON: Yes, Your Honor.

23 THE COURT: The only concern I have and I
24 probably have very little concern is that if all three of
25 these witnesses who did grand jury testimony about this

1 balked and didn't testify the way you anticipated.

2 Although at that point you can read the grand jury
3 testimony right in. whether we have a bell that can't be
4 unrung. I don't think so because I know that exactly --

5 MS. WILKINSON: If I --

6 THE COURT: I know exactly what you would do if
7 they came in and said I deny. You can read their grand
8 jury right to the -- under the evidence rules.

9 MS. WILKINSON: Exactly, Your Honor. And I have
10 a report of another witness, the correctional officer, a
11 statement that Mr. Morales made to him implicating himself
12 in the murder, too, in addition to the false lie
13 obviously. So I would prefer to proceed that way just
14 because, you know, the --

15 THE COURT: Your motion is granted.

16 MS. WILKINSON: Thank you, Your Honor.

17 THE COURT: Now that's the 57. I've got the
18 government's motion concerning statements by represented
19 parties. I'm not quite sure what you want me to do. Let
20 me put it this way. I'm not a stranger to the ethical
21 rules and bear a lot of scars from being involved in
22 ethical issues like this before. But the question I have
23 when you're talking about the conduct at issue -- and let
24 me put the motion in front of me for a second here -- is
25 the ethical rule that's involved here is one that

1 restricts the attorney from having communications with a
2 party, a represented party who regard to the subject of
3 the representation. And the specific Rule 4.2(A) provides
4 in representing a client a lawyer shall not communicate
5 about the subject of the representation with a person who
6 the lawyer knows is represented by -- in the matter by
7 another lawyer unless the lawyer has the consent of the
8 other lawyer or is authorized by law or court ordered to
9 do so.

10 So my question is if Mr. Jones is in jail on a
11 shoplifting charge and Mr. Zucker goes to see him about
12 this case, why is that precluded with regard -- in other
13 words, simply the fact that somebody has a lawyer does not
14 mean nobody can talk to him.

15 MR. CLARKE: Your Honor, the government would
16 actually agree. Marty Clarke for the government, Your
17 Honor. May I approach the Court with the Dustin Ray's
18 statement we just received this morning from the defense
19 counsel?

20 THE COURT: All right. Let me see it.

21 MR. CLARKE: The handwritten statement
22 supposedly by Mr. Zucker. He filled it out at the prison
23 and then gave it to Mr. Ray to affirm under the penalties
24 of perjury. And, Your Honor, we understand the Court's
25 concern about whether or not speaking to Mr. Ray was about

1 a matter concerning his case. And our position is that
2 overwhelmingly, it was because Mr. Zucker was aware that
3 Mr. Ray had a drug case and had pled guilty and now
4 thinks, we would allege, that he's cooperating with the
5 government and he's going to go find out if in fact he's
6 cooperating with the government to provide information to
7 get a 5K in his case.

8 So if he goes to Mr. Ray and asks him questions
9 about the information he's going to provide within his
10 case to get the 5K, clearly, Mr. Jerry Ruter, his
11 attorney, would want to be there to protect him within his
12 own case. I think clearly an attorney just to walk in and
13 say well, you know what, I'm not going to ask you how many
14 kilos you sold, but here is what I am going to ask you.
15 I'm going to ask you what kind of 5K information you have
16 that you're going to provide in the sentencing of your
17 case that's in the case.

18 And I should advise the Court that by this time,
19 Mr. Ray had proffered, we had met with Mr. Ruter, we were
20 talking about his 5K cooperation and how that would help
21 him in his case.

22 And Your Honor, we've provided this motion for
23 two reasons. One is we wanted to discuss the 4.2 and the
24 ramifications of that. But we also wanted to frame the
25 possible, what could be a catastrophic event in the middle

1 of the trial. If Mr. Ray takes the stand, if Mr. Zucker
2 is the one who is cross-examining him and if he presents
3 as a prior inconsistent statement, Mr. Zucker's
4 handwritten note which is totally at odds with what
5 Mr. Ray had already proffered to almost a year earlier,
6 Mr. Ray I will tell the Court is going to say he was
7 scared to death of the attorney who was representing the
8 man who had killed a witness in the past to try and effect
9 a trial. And he was told by his own attorney, Mr. Ruter
10 told him and, of course, the government said that your
11 safety is paramount and you've got to keep this quiet.

12 So when he was confronted, clearly at the
13 request of Mr. Morales and we're allowed that inference in
14 front of the jury to go and speak to a witness in this
15 case about the admissions to a murder of a witness, Your
16 Honor, that's almost 404(b). In fact I would argue that
17 it is. We would hope if this was a different matter, we'd
18 put Mr. Zucker on. And what we're saying is that if the
19 trial unfolds in that way, right in front of this jury, we
20 have 404(b) happening right before their very eyes by the
21 attorney representing Mr. Morales. That's the inference.

22 This is a clumsy, heavy-handed approach to go to
23 a witness who is unrepresented under a thin interpretation
24 of 4.2(A) and say it's okay to talk to me. Oh, and by the
25 way, he never talked to you about his case, did you? No,

1 he did not. Will you swear to that? Put your John
2 Hancock there. And then as soon as that happens, we get a
3 call from the attorney, look what this attorney is trying
4 to do.

5 It's important to note, Your Honor, that
6 Mr. Ray's cooperation was never disclosed to Mr. Zucker or
7 to Mr. Proctor or to anybody. How did they know to go to
8 prison? And on that day, Your Honor, if I put Mr. Zucker
9 on, I'm going to find out that it wasn't just Mr. Ray. It
10 was also Mr. Stokes who's going to come in and testify to
11 the same thing. And there's a third person as well.

12 THE COURT: So this gentleman, Dustin Ray, what
13 is it that you're intending to elicit from him?

14 MR. CLARKE: He will say that they were both
15 together at the federal detention center in Baltimore
16 City, the Chesapeake Detention Center and Mr. Morales just
17 laid it all out. He said this is what I did. It's a
18 little more nuance than that. But he said look, Robert
19 Long, shot him in the back of the head, turned around,
20 shot him in the eye, fell back, all that stuff. Give him
21 all the details. And Mr. Stokes is going to say the same
22 thing. And they both were approached by the counsel for
23 the defendant in a witness murder case.

24 Then there's a third person, a third person that
25 Mr. Zucker also approached on that same day. He went to

1 prison on one day and we have the note and we have his
2 signature and his clerk's signature when he went to the
3 C.D.C. to interview these witnesses. The third witness,
4 Mr. Ray will say, was out in the yard after Mr. Zucker
5 went and spoke to that third witness. And when they were
6 out in the yard, Mr. Ray will say that Mr. Morales said
7 hey, Witness Number 3, how come you didn't sign my
8 affidavit? Because that third witness wouldn't sign a
9 handwritten affirmation of what he had said to Mr. Zucker.

10 The note itself and the conditions under which
11 it was written are highly suspect. At the least, it's a
12 heavy-handed attempt to set up a witness in a federal
13 trial. At the worst, it's 404(b) witness intimidation.
14 So it's a real problem. And it's a problem for the Court
15 because and I understand that, you know, we don't have the
16 benefit of the Fourth Amendment on this side of the table.
17 Only has 4.2(A). And the Court is right when you ask the
18 government what's the sanction here. You know, even if
19 you were to find that it was unethical, does the Court
20 have the right to preclude what arguably on their side is
21 evidence to be excluded from his trial that's been
22 extracted by his attorney? I think that's problematic.
23 But at least we need to frame for Your Honor where we're
24 going and have some precautions made before jeopardy
25 attaches. At least get some discussions with counsel

1 about how to approach this. And then the Court -- as an
2 officer of the court, we'll have this scenario now and
3 what do we do?

4 THE COURT: What are we going to do at trial if
5 Dustin Ray gets up on the stand and says what you say he
6 is going to say and then on cross-examination, he's
7 confronted with this statement --

8 MR. CLARKE: Exactly.

9 THE COURT: -- and he says I did that because
10 this guy, Zucker, scared the hell out of me and Morales is
11 known to kill people and I wanted to sign whatever he
12 wanted to get him out of my face? And do we end up having
13 a lawyer witness problem with Mr. Zucker?

14 MR. CLARKE: I think clearly.

15 THE COURT: I mean it may be that to respond to
16 that type of testimony from a witness if he says that, it
17 may force Mr. Zucker into becoming a witness to say oh, I
18 didn't do that, I was charming and pleasant and didn't
19 even suggest all these things and so forth. I mean
20 it's --

21 MR. CLARKE: Well, and I got to say, Your Honor,
22 two things. One is again, unless they can say otherwise,
23 we never disclosed Dustin Ray. So it's coming from the
24 defendant, the person who's on trial for killing a
25 witness, a witness that was discussed with Mr. Ray. He

1 already told Mr. Ray that he killed a witness in a state
2 case. And so his -- and that cooperation of Mr. Ray was
3 never made known to defense counsel. So that's not
4 privileged. It's an inference that it came from him.

5 Secondly, the nature of this statement, Your
6 Honor, I don't mean to be derogatory, but it's just thin.
7 In an of itself, it's evidence. The notion that prisoners
8 don't talk about their cases and these are Mr. Zucker's
9 words. They're not Mr. Morales'. They are Mr. Zucker's
10 words. And these aren't Mr. Ray's words. It's
11 essentially Mr. Zucker asking Mr. Ray, the witness in a
12 murder intimidation case, isn't this true, isn't this
13 true, isn't this true. Here, sign on the bottom.

14 THE COURT: So has the existence of this been
15 brought to the attention of the attorney for Dustin Ray?

16 MR. CLARKE: Yes.

17 THE COURT: What does he say?

18 MR. CLARKE: We asked Mr. Ruter to try and get
19 us a copy of this and we have been trying to get a copy
20 and Mr. Zucker was nice enough to give us a copy this
21 morning.

22 MR. ZUCKER: Excuse me. The first time it was
23 ever requested was this morning. It was given to them --

24 THE COURT: Let me just finish that. So --

25 MR. CLARKE: We tried to get it -- what we had

1 hoped to do, Your Honor, is to have this matter pressed
2 through the counsel for Mr. Ray and that wasn't
3 successful. Mr. Ruter also wanted to get a copy of this,
4 but he didn't just press it as hard -- he is outraged
5 about this. But he never got a copy for the Court. So we
6 ended up getting a copy this morning. So yes, Mr. Ruter
7 is very much aware of it and he's very concerned for
8 Mr. Ray.

9 THE COURT: well, what is it that the government
10 proposes that I do?

11 MR. CLARKE: well, first of all, Your Honor, I
12 think that the Court should find that the matter about
13 which Mr. Zucker spoke to Mr. Ray is the case was relevant
14 and was essential and was a matter related to the case for
15 which Mr. Ray was still pending sentence.

16 THE COURT: I understand the government's
17 theory. It is that this is within the scope of Rule
18 4.2(A) --

19 MR. CLARKE: Yes.

20 THE COURT: -- and it is the subject of a
21 representation because this is a defendant who had pled
22 guilty who obviously would like to have whatever his
23 offense level is reduced and it would be in his best
24 interest with counsel representing him to cooperate to try
25 to get a 5K. And by doing this, it in effect calls into

1 question the 5K.

2 MR. CLARKE: Correct, Your Honor.

3 THE COURT: Therefore, it's within the scope of
4 the representation and therefore, it was not proper to
5 solicit it because it was within the scope of the
6 representation.

7 MR. CLARKE: That is correct.

8 THE COURT: In 25 words or less, that's your
9 position?

10 MR. CLARKE: Yes. And in fact he had provided
11 that proffer and was continuing to proffer around this
12 time. And Ms. Wilkinson is making a point in my ear --

13 THE COURT: Listen to her.

14 MR. CLARKE: -- which is probably going to
15 happen a lot, Your Honor.

16 You know, no other attorney would want their
17 client to be questioned about a matter that no one else
18 knows about that's going to be essential to their client
19 getting a reduced sentence. The irony of today is that
20 Mr. Zucker and Mr. Proctor questioned an attorney from
21 Texas about the voluntariness of an interview in Texas
22 when an attorney in this case goes under these
23 circumstances in a witness murder to talk to a witness who
24 the witness murderer had made a confession and elicits
25 this kind of response.

1 THE COURT: Well, are you asking me to exclude
2 this statement?

3 MR. CLARKE: One moment, Your Honor.

4 (Counsel conferred.)

5 MR. CLARKE: I don't want to create precedent.
6 I think the precedent of saying that this was a 4.2(A)
7 violation is a good precedent. I think it's the right
8 one. What I don't want to do is have an issue brought up
9 on appeal and a 2255 for counsel. It would seem to me
10 that perhaps counsel can consider and speak with
11 Mr. Morales and talk about whether or not between
12 themselves whether the evidentiary value of the evidence
13 that they obtained of a prior inconsistent statement under
14 the circumstances of this case was a wise course and make
15 some representation --

16 THE COURT: I don't want to encourage that to
17 happen. I mean I can't tell the defense what to do and I
18 can't tell the prosecution what to do in terms of what
19 evidence they offer or not offer. But it seems to me that
20 if this is offered in cross-examination of this or any
21 other witness under similar circumstances, it's going to
22 open the door pretty wide to the government challenging
23 the circumstances under which the statement was obtained
24 and going into questions of whether it was obtained in
25 violation of the rule and --

1 MR. CLARKE: And, Your Honor, if I may, this
2 Court has the overall Sixth Amendment rights of Mr.
3 Morales to consider and he does have two counsel and if
4 they're going to say that they're going to rely on this,
5 then the Court perhaps maybe to avoid a what appears to be
6 a high probability of an issue of having counsel on the
7 stand and a high probability of an appellate issue or even
8 a mistrial should protect the case up front and not allow
9 Mr. Zucker to participate and make him available to the
10 government. But hopefully, we can avoid that, Your Honor.

11 THE COURT: Well, let's hope we can avoid that.
12 I --

13 MR. ZUCKER: Can I respond at some point, judge?

14 THE COURT: You're going to have a chance to
15 respond. I'm just talking out loud. The concern I
16 have -- I don't know what Dustin Ray is going to say when
17 he's presented with this.

18 MR. CLARKE: I tell you, we've asked him and his
19 attorney has been present when we've asked him and he said
20 that he was scared to death and he did what he thought he
21 had to do, what would have been required of him which was
22 to keep his cooperation a secret. So he had to lie for
23 his own safety and to keep it secret per the 5K agreement.
24 And per his plea agreement, he's supposed to keep things a
25 secret and concealed to protect his 5K provision under his

1 plea agreement and that he had to and he felt intimidated
2 and coerced to do it.

3 THE COURT: All I can say is if this is offered
4 by the defense, it's going to make things very complicated
5 and I'm not going to make a blanket ruling on this right
6 now. I'm troubled, but let me hear from Mr. Zucker.

7 MR. ZUCKER: Let me say, first of all, judge, I
8 have an ethical duty to investigate a case. This was
9 someone who had potential information. I met with him. I
10 complied with all the rules and I resent the implication
11 that there was anything menacing, threatening or
12 intimidating about it. I met with him. I told him who I
13 was. I complied with every rule in the book. who I was,
14 why I was there. He had the right to talk to me, not talk
15 to me. I couldn't force him to talk to me. If he had a
16 lawyer, I would contact that lawyer and if he wanted me,
17 you know, I would consult with his lawyer.

18 I didn't know exactly why he was at -- I forget
19 the name of the facility -- Chesapeake. That he was
20 identified as someone who might have information about
21 this and I was under a duty to investigate this. And I
22 couldn't have complied any more with the rules concerning
23 an attorney interviewing a witness.

24 we had no knowledge, no basis to believe he was
25 cooperating. Point of fact, I'm not a hundred percent

1 sure, I think he was somebody who actually initiated or
2 requested the contact. There were several people who
3 communicated or I was told wanted to talk with me. I
4 believe there had been a separation order and he had asked
5 me to contact -- and I could be confusing someone. I
6 think he was saying he didn't know why it was on and was
7 upset that it was on as well.

8 There was nothing menacing, nothing
9 intimidating. And he particularly was told you have
10 absolutely no obligation to talk to me and if you don't
11 want to talk to me, you don't have to.

12 THE COURT: What about the inherently coercive
13 impact of this? You have a defendant -- a gentleman who
14 we now know has informed the government that there's been
15 a full confession and so forth by Mr. Morales. That
16 confession includes having arranged for the killing of a
17 witness. And he has cooperated. He's cooperated against
18 somebody who he believes, rightly or wrongly, has arranged
19 to kill a witness in a case. In comes a lawyer
20 representing that gentleman. Says I want to talk to you.
21 Isn't there something frightening about the fact that a
22 lawyer representing who he believes is a person who has
23 been willing to kill a witness comes to see him and says
24 he didn't tell you anything, did he, and sign the
25 statement here that says I never discussed the case with

1 him at all? Isn't there a legitimate fear factor that,
2 gee, if I don't sign this thing, I would be the next guy
3 with a bullet in my head?

4 MR. ZUCKER: I think there's two separate
5 questions here. One is the presumption that I led him
6 with -- that I approached him with leading questions. I
7 asked him if he knew anything, what he knew, what he
8 heard, could he help us. We went to him looking for
9 information. All right?

10 THE COURT: Well, what led you to Dustin Wright?

11 MR. ZUCKER: What led me to what?

12 THE COURT: What led you to talk to him at all?

13 MR. CLARKE: Dustin Ray, Your Honor.

14 THE COURT: Dustin Ray. What led you to talk to
15 him in the first place?

16 MR. ZUCKER: Conversations with my client.

17 THE COURT: Well, all I can tell you --

18 MR. ZUCKER: He was somebody who was
19 identified -- and I believe he was the one who indicated
20 that he wanted to talk to me to my client.

21 THE COURT: All I can tell you is that we're
22 sitting on a bomb here. And, you know, I think everybody
23 needs to reflect on what happens with this because if this
24 is used in cross-examination of Mr. Ray, it's going to be
25 fair game for Mr. Ray to explain why he signed this and to

1 significantly embellish whatever he said on direct about
2 what Mr. Morales told him and saying I was scared to
3 death, that I would be the next person with a bullet in my
4 head and when his lawyer comes to see me, I'm going to say
5 I didn't say nothing to nobody.

6 MR. ZUCKER: That would be fine. Had he said
7 nothing to nobody, that would have been great. Had he
8 refused to talk to me, that was well within his rights.

9 THE COURT: No. I said that's what he I think
10 would be at liberty to say by further examination of the
11 government.

12 MR. ZUCKER: If we make that strategic decision,
13 we have been advised of the inherent risks.

14 THE COURT: Well, let me just say this. I'm
15 going to not act on this motion today. I'm going to
16 encourage you all to reflect on this because I do think
17 that we can get into one significant heck of a mess
18 dealing with this and it in fact might hurt the defendant.
19 That's my concern. If he's not a witness who is going to
20 say, you know, I'm a guy in jail and this guy told me he
21 committed all kinds of crimes, jurors are going to look at
22 that a little suspiciously to begin with. But then if on
23 cross-examination this comes out, they're going to
24 significantly potentially -- I'm not saying this is the
25 case -- would give the direct examination far more

1 significance because his answer to why he signed this
2 embellishes what he said in the first place about
3 Mr. Morales telling him things. So it's a trial strategy
4 thing and I got to protect the record for everybody here,
5 too, and I'm not going to make a ruling on this. But I do
6 have a concern about the communication. I don't know
7 enough about what this gentleman's lawyer has to say about
8 this. We'll see what he had to say about it. He may feel
9 strongly the other way or may not care. I don't know.

10 But the purpose of Rule 4.2(A) is to be certain
11 that a represented party does not have people
12 communicating with them about the subject of
13 representation without notice to that lawyer and
14 participation. And the government makes a significant
15 case that this is a person sitting in the Chesapeake
16 Detention Center, awaiting sentencing, hoping and praying
17 that he's going to get the benefit of a downward departure
18 and is approached by a lawyer for somebody who he thinks
19 is a witness killer and the last thing in the world he
20 wants to have out there is that he is cooperating. So
21 it's a predicament. What I would urge both sides to do is
22 to think about this one because this could erupt into a
23 big problem for the trial, but it could also erupt into a
24 prejudicial problem for the defendant. But that's just my
25 musings. I'm going to defer ruling on this motion. All

1 right.

2 Now what else do we have because I have a civil
3 case that's ready to start in a few minutes here.

4 MS. WILKINSON: Your Honor, I think the last
5 motion just is with regard to the proffer statements and
6 we have been discussing in great detail what might open
7 the door, not open the door to Mr. Morales' confession in
8 this case.

9 THE COURT: Right.

10 MS. WILKINSON: And I have spoken to both
11 counsel about it. And we'll continue to work that out,
12 Your Honor. There are a couple of little issues. The
13 bottom line to our motion was that we didn't want counsel
14 arguing something in opening statements that would open
15 that door and --

16 THE COURT: Which motion is this?

17 MS. WILKINSON: This is Docket Number 62.

18 THE COURT: 62. Let me put it in front of me
19 here.

20 MS. WILKINSON: And I think the main thing for
21 the Court though is that we attached the proffer statement
22 because the Court hadn't seen that yet. So the Court will
23 know what Mr. Morales told us about the murder in very
24 explicit detail including who did it. And if they take
25 the position and argue something outside that, the

1 government is going to contend that they've opened the
2 door and I know that they're aware of that. This is just
3 about the argument at this point and we will continue to
4 talk about it. Have I represented that fairly, counsel?
5 Mr. Proctor?

6 MR. PROCTOR: Yes.

7 MR. ZUCKER: I guess the difference is there is
8 probably a difference of opinion frequently about what is
9 opening the door and we will continue to try and work that
10 out.

11 THE COURT: Well, try to work it out because
12 what I'd like to do is have you steer away from this in
13 opening statements. And then if it turns out that
14 something would be appropriate, it may end up being proper
15 for closing argument depending on what the evidence is at
16 trial.

17 MR. ZUCKER: Understood. But I guess the point
18 is where there is a difference of opinion, it would be
19 helpful to the parties if the Court would entertain
20 motions in limine, i.e., we believe this would not open
21 the door, they believe it would. If we get a ruling from
22 the Court --

23 THE COURT: Tell me what motion you entertain.

24 MS. WILKINSON: I'll give you an example. A
25 witness -- a shooting happened behind a park in Baltimore

1 and one of the park workers who called 911 had seen out of
2 a corner of her eye what she believed was a young black
3 man running from the scene and she says that on a 911
4 tape. And there's no doubt here today that Mr. Morales
5 has told us that the men who killed Rob Long were not
6 African-American. They were two white men. And
7 therefore, the government's view that if they elicit
8 evidence, corroborative evidence that a witness saw
9 someone other than a white man running from the scene to
10 be able to argue that someone else was the shooter in this
11 case, that clearly opens the door in this case because
12 that would be putting in evidence different than
13 Mr. Morales' proffer and that's the best example I can
14 give you.

15 THE COURT: well, I mean if that's what you're
16 saying, then I'm going to grant the motion which simply
17 means that if you are going to make an argument that is
18 inconsistent with the proffer, that will relieve the
19 government of its obligation not to use the proffer.

20 MR. ZUCKER: we understand that's the ruling.
21 There may be a difference of opinion as to what is and
22 isn't inconsistent.

23 THE COURT: The best thing to do is to avoid
24 wandering into this in opening statements.

25 MR. ZUCKER: I think that's fair and I think we

1 both will certainly agree to try to avoid that. And I
2 just wish to alert the Court that there probably will be
3 times that we will seek to address the Court at the bench
4 or in limine about this.

5 THE COURT: Well, I'm sure we will be talking a
6 lot up here with the usher on.

7 MR. ZUCKER: But I meant in limine so we don't
8 accidentally trip over the landmine.

9 THE COURT: All right. Do I have everything
10 covered? I think I do.

11 MR. CLARKE: Your Honor, Mr. Ray's letter is
12 Government's 1 for purposes of the pretrial motion.
13 Correct?

14 THE COURT: Mr. Ray's what?

15 MR. CLARKE: Statement that I provided Your
16 Honor with marked as an exhibit.

17 THE COURT: I don't think it's been marked.

18 MR. CLARKE: Government's 3.

19 THE COURT: Government's 3. Okay. You may
20 leave this one here for --

21 MR. CLARKE: Yes.

22 MS. WILKINSON: Your Honor, I know the Court has
23 another hearing. I just wanted to raise one issue that if
24 the Court needs us to brief, I don't know how counsel
25 feels about it yet. I did highlight it with them. One of

1 the witnesses that the government intends to call is a
2 reporter from the City Paper in Baltimore and we have
3 obtained the appropriate approvals to be able to call the
4 reporter and it's with reference to statements that
5 Mr. Morales made to him on April 17, 2008 that were
6 published in the City Paper at the time. And the reporter
7 had intended to cover the trial. And wants to cover the
8 trial apart from his testimony. And we would ask for a
9 exception to the rule on witnesses for Mr. Ericson to be
10 able to cover the trial, but to be able to testify because
11 his testimony is limited to the statements.

12 THE COURT: What is the position of the defense?

13 MR. PROCTOR: Absolutely not. He should be the
14 first witness if they want to call him. I don't want his
15 testimony colored by what everybody else says. If he
16 wants to cover it, the government is welcome to call him
17 first off the bat.

18 MS. WILKINSON: The government's response to
19 that, Your Honor -- and I know that this is a new issue to
20 the Court and we can cover it on Tuesday -- is that
21 Mr. Ericson's testimony can't be colored by any other
22 witnesses because he's limited to testifying only about
23 what's in the newspaper article. That's the limit.
24 unless they want to color his testimony --

25 THE COURT: This is a new one. I'm not going to

1 rule on it today. You have to give me some law that you
2 haven't given me.

3 MS. WILKINSON: Very well, Your Honor. If there
4 is law, I will bring it to the Court's attention. I have
5 to look at the actual rule on witnesses and I'll --

6 THE COURT: Look at the rule and see if I have
7 the authority to make an exception. And there might -- if
8 there is ability to make an exception, there might be some
9 prophylactic method to be able to do it. I mean the rule
10 is intended to preclude witnesses from reinforcing each
11 other by listening to the testimony both before and after
12 and discussing it and so forth and --

13 MS. WILKINSON: There's --

14 THE COURT: It sounds to me -- but I don't know
15 if there's an ability to make an exception. If what
16 you're saying is that all he's going to testify about is
17 that I'm a reporter and Mr. Morales told me the following
18 things that I put into a story that was published,
19 period --

20 MS. WILKINSON: Exactly.

21 THE COURT: -- I'm not sure how that gets
22 reinforced or anything else by virtue of observing a
23 trial. But --

24 MS. WILKINSON: Balancing with the freedom of
25 the press.

1 THE COURT: The reporter ultimately may have to
2 have a Hobson's choice. You're under subpoena and go get
3 another reporter.

4 MS. WILKINSON: Understood. Complicated issues
5 of freedom of the press and the right to the government to
6 have a witness, Your Honor.

7 THE COURT: Well, you can give me some
8 additional thinking on that on Monday afternoon maybe and
9 I will try to keep up with it. Now how much time does
10 each side want for opening statements?

11 MS. WILKINSON: Your Honor, I would think I
12 would not be longer than 45 minutes.

13 THE COURT: And defense?

14 MR. ZUCKER: Probably about the same.

15 THE COURT: All right. So I mean I'm not a guy
16 that sits up here with a clock. But, you know, if you
17 tell me 45 and you're rounding around 55 and 60, I may
18 start clearing my throat a lot.

19 MS. WILKINSON: I'm a pretty good clock watcher.
20 Your Honor, the one thing that the government would ask
21 for some guidance on just because of witness scheduling.
22 We were thinking that Tuesday would be jury selection and
23 possibly opening unless counsel really want to do openings
24 on Wednesday and then start the actual witness testimony
25 on Wednesday.

1 THE COURT: I'm hopeful that we will get all of
2 the jury selection done on Tuesday and maybe opening
3 statements. I think that we are probably going to be so
4 dead tired after we've gotten that done, that it's not
5 likely I'll see any witnesses on Tuesday.

6 MS. WILKINSON: So it would be all right if I
7 had our first witness ready to go first thing Wednesday
8 morning?

9 MR. ZUCKER: No objection. In all candor, I
10 don't know -- I may have picked a jury with you and I'm
11 not sure about the procedures. I'll discuss it with Mr.
12 Proctor. But I got a feeling, it will probably take the
13 best part of the day if not all day.

14 THE COURT: Oh, I don't disagree. I can see the
15 number of people and extremists about being on a jury
16 service for four weeks.

17 MS. WILKINSON: Two to three weeks, Your Honor.
18 I think we have it narrowed down to --

19 THE COURT: Well, I know. But I'm going to tell
20 them it's long as four. All right. And remember, I need
21 to have somebody submit to me a jointly-approved short
22 version of the elements. I don't need the explication of
23 the elements. I just need the elements.

24 MS. WILKINSON: I will provide that to your
25 clerk today, Your Honor.

1 THE COURT: All right.

2 MR. ZUCKER: Judge, should we just agree to open
3 on Wednesday?

4 THE COURT: Excuse me?

5 MR. ZUCKER: I wonder if we should just agree to
6 open on Wednesday.

7 THE COURT: No. I want you to be ready on
8 Tuesday. You may end up doing it on Wednesday. But I'd
9 rather -- if I manage to get the jury selected early
10 Tuesday afternoon, I want to go to openings.

11 MS. WILKINSON: And I mean I'm prepared to go
12 forward. Our calendar is based on --

13 THE COURT: I don't want to have openings split
14 between days. That I don't want to have. So if we're
15 going to do openings, we're going to have to have
16 everybody ready to go by 3. If we haven't got a jury
17 selected by 3, then we'll probably have to go --

18 MS. WILKINSON: That sounds fair and reasonable,
19 Your Honor.

20 THE COURT: But I don't want to be suddenly done
21 with jury selection at 1 and recess for the day. I'd like
22 to get the case moving along. Okay. Well, we'll see you
23 Tuesday.

24 THE DEFENDANT: Your Honor, could I speak before
25 we go? I have a couple of questions I'd like to ask you.

1 THE COURT: Tell your counsel what the questions
2 are and I'll address them.

3 MR. ZUCKER: I guess the best way to summarize
4 it, Mr. Morales has been given access and made good use of
5 much of the discovery and he has some questions. I think,
6 frankly, they should be raised with the prosecutor before
7 they are raised with you. So what I've told him is if the
8 marshals allow him to remain here, I will remain here
9 today for as long as it takes to make sure I understand
10 exactly what he wants and if the prosecutors make
11 themselves available and they are indicating they will, I
12 will raise it with them today before I leave the
13 courthouse.

14 THE COURT: That would be fine. All right. I'm
15 going to take a 15-minute recess and then I will begin the
16 civil case.

17 MS. WILKINSON: Thank you, judge.

18 (Proceedings concluded.)
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CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motions hearing in the case of the United States of America versus Jose Joaquin Morales, Criminal Action Number RWT-12-0480, in said court on the 20th day of September, 2013.

I further certify that the foregoing 99 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 7th day of March, 2014.

Lisa K. Bankins

Lisa K. Bankins
Official Court Reporter

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| E | <p>established [1] 62/6</p> <p>establishes [1] 62/1</p> <p>ethical [5]</p> <p>even [9]</p> <p>event [1] 75/25</p> <p>ever [2] 23/23 80/23</p> <p>every [5]</p> <p>everybody [4]</p> <p>everything [4]</p> <p>evidence [20]</p> <p>evidentiary [6]</p> <p>exact [2] 31/5 56/5</p> <p>exactly [14]</p> <p>examination [22]</p> <p>examined [1] 19/1</p> <p>examining [1] 76/2</p> <p>example [2] 91/24 92/13</p> <p>exception [4]</p> <p>exceptions [1] 16/14</p> <p>excerpts [1] 72/16</p> <p>exchange [1] 21/21</p> <p>excludable [1] 18/6</p> <p>exclude [1] 83/1</p> <p>excluded [1] 78/21</p> <p>excluding [3] 22/15 63/15 63/16</p> <p>exclusion [3] 62/15 62/19 63/22</p> <p>exclusionary [2] 62/2 62/22</p> <p>Excuse [3] 20/8 80/22 98/4</p> <p>excused [1] 60/17</p> <p>exhibit [5]</p> <p>existed [1] 63/4</p> <p>existence [2] 71/23 80/14</p> <p>expect [1] 55/18</p> <p>expectation [1] 50/8</p> <p>experience [3] 42/6 44/16 70/12</p> <p>explain [1] 87/25</p> <p>expletive [1] 45/21</p> <p>explication [1] 97/22</p> <p>explicit [1] 90/24</p> <p>extent [5]</p> <p>extracted [1] 78/22</p> <p>extremists [1] 97/15</p> <p>extricate [1] 70/20</p> <p>extrinsic [1] 17/7</p> <p>eye [3] 40/18 77/20 92/2</p> <p>eyes [2] 4/13 76/20</p> | <p>federally [1] 23/22</p> <p>feel [1] 89/8</p> <p>feeling [1] 97/12</p> <p>feels [1] 93/25</p> <p>fell [2] 17/24 77/20</p> <p>felt [2] 49/16 85/1</p> <p>female [1] 60/22</p> <p>Ferko [19]</p> <p>few [4]</p> <p>fifty [1] 30/3</p> <p>file [3] 53/14 54/1 54/15</p> <p>filed [4]</p> <p>files [5]</p> <p>filing [1] 40/3</p> <p>filled [1] 74/22</p> <p>find [11]</p> <p>finding [1] 64/16</p> <p>finds [2] 23/10 67/10</p> <p>fine [3] 8/14 88/6 99/14</p> <p>finish [2] 16/23 80/24</p> <p>fired [2] 39/24 51/10</p> <p>first [27]</p> <p>fishing [1] 11/2</p> <p>five [3] 23/25 28/11 34/21</p> <p>flag [1] 16/8</p> <p>flew [5]</p> <p>flexibility [1] 26/9</p> <p>floor [2] 56/7 56/10</p> <p>Florida [1] 14/12</p> <p>focus [2] 18/4 21/6</p> <p>follow [1] 6/20</p> <p>following [2] 28/4 95/17</p> <p>follows [1] 19/1</p> <p>force [2] 79/17 85/15</p> <p>foregoing [1] 100/11</p> <p>forget [3] 57/23 58/1 85/18</p> <p>form [2] 4/3 11/5</p> <p>former [1] 54/4</p> <p>forth [7]</p> <p>forward [1] 98/12</p> <p>found [2] 65/24 66/19</p> <p>foundation [4]</p> <p>four [9]</p> <p>four-week [1] 3/23</p> <p>Fourth [3] 12/12 12/23 78/16</p> <p>frame [2] 75/24 78/23</p> <p>frankly [2] 41/8 99/6</p> <p>freedom [2] 95/24 96/5</p> <p>frequently [1] 91/8</p> <p>frightened [1] 49/19</p> <p>frightening [1] 86/21</p> <p>front [11]</p> <p>full [2] 12/15 86/15</p> <p>furnished [1] 64/8</p> <p>further [7]</p> <p>fussy [1] 58/2</p> <p>future [1] 41/5</p> | <p>given [13]</p> <p>giving [2] 5/4 47/21</p> <p>glad [4]</p> <p>global [3] 16/5 16/15 32/9</p> <p>go [35]</p> <p>goes [4]</p> <p>going [91]</p> <p>good [12]</p> <p>got [17]</p> <p>gotten [2] 32/7 97/4</p> <p>government [56]</p> <p>government's [18]</p> <p>grand [5]</p> <p>Grande [1] 41/3</p> <p>grant [5]</p> <p>granted [2] 15/16 73/15</p> <p>Gray [1] 70/13</p> <p>great [3] 66/9 88/7 90/6</p> <p>Greenbelt [3] 1/4 1/22 9/9</p> <p>grounds [1] 11/7</p> <p>guess [10]</p> <p>guidance [1] 96/21</p> <p>guilty [2] 75/3 81/22</p> <p>guy [7]</p> |
| F | <p>F-E-R-K-O [1] 24/15</p> <p>face [1] 79/12</p> <p>facility [1] 85/19</p> <p>facing [3] 38/9 44/21 49/16</p> <p>fact [16]</p> <p>factor [1] 87/1</p> <p>factors [1] 29/24</p> <p>facts [2] 22/23 29/12</p> <p>factual [1] 18/9</p> <p>failed [1] 54/17</p> <p>failing [1] 32/14</p> <p>fair [18]</p> <p>fairly [2] 67/9 91/4</p> <p>fairness [2] 12/17 71/21</p> <p>false [1] 73/12</p> <p>familiar [1] 62/6</p> <p>famous [1] 34/9</p> <p>far [2] 53/6 88/25</p> <p>farther [1] 69/13</p> <p>faulting [1] 63/18</p> <p>fear [1] 87/1</p> <p>fears [1] 70/19</p> <p>federal [13]</p> | <p>G</p> <p>game [2] 16/21 87/25</p> <p>garbage [1] 30/7</p> <p>Garrett [1] 25/1</p> <p>Gary [3] 1/14 1/14 3/16</p> <p>gave [5]</p> <p>gee [1] 87/2</p> <p>generally [3] 10/25 32/9 46/3</p> <p>gentleman [6]</p> <p>gentleman's [1] 89/7</p> <p>get [42]</p> <p>get-go [1] 24/2</p> <p>gets [6]</p> <p>getting [5]</p> <p>give [13]</p> | <p>H</p> <p>H-U-L-I-N-G [1] 24/23</p> <p>had [84]</p> <p>hadn't [1] 90/22</p> <p>half [1] 10/3</p> <p>Hancock [1] 77/2</p> <p>hand [1] 18/21</p> <p>handed [2] 76/22 78/12</p> <p>handwritten [3] 74/21 76/4 78/9</p> <p>happen [5]</p> <p>happened [8]</p> <p>happening [2] 28/8 76/20</p> <p>happens [5]</p> <p>happy [5]</p> <p>hard [4]</p> <p>has [38]</p> <p>Hasbib [1] 32/18</p> <p>have [197]</p> <p>haven't [7]</p> <p>having [9]</p> <p>he [186]</p> <p>he's [29]</p> <p>head [4]</p> <p>health [1] 12/2</p> <p>hear [14]</p> <p>heard [8]</p> <p>hearing [13]</p> <p>hearsay [1] 68/11</p> <p>heavily [1] 12/19</p> <p>heavy [2] 76/22 78/12</p> <p>heavy-handed [2] 76/22 78/12</p> <p>heck [1] 88/17</p> <p>hell [2] 31/17 79/10</p> <p>help [10]</p> <p>helped [1] 50/17</p> <p>helpful [2] 50/7 91/19</p> <p>her [11]</p> <p>here [47]</p> <p>hereby [1] 100/5</p> <p>hereto [1] 100/15</p> <p>herself [1] 27/11</p> <p>hey [1] 78/7</p> <p>Hidalgo [2] 54/23 55/3</p> <p>high [4]</p> <p>higher [1] 47/3</p> <p>highlight [1] 93/25</p> <p>highly [2] 49/12 78/11</p> <p>him [77]</p> |

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| <p>H</p> <p>himself [13]</p> <p>hired [2] 23/16 42/14</p> <p>hiring [1] 29/16</p> <p>his [84]</p> <p>Hispanic [1] 60/22</p> <p>history [6]</p> <p>Hobson's [1] 96/2</p> <p>hold [2] 35/13 35/13</p> <p>home [1] 7/1</p> <p>honesty [1] 23/23</p> <p>Honor [59]</p> <p>HONORABLE [1] 1/8</p> <p>hope [3] 3/13 76/17 84/11</p> <p>hoped [1] 81/1</p> <p>hopeful [1] 97/1</p> <p>hopefully [1] 84/10</p> <p>hoping [1] 89/16</p> <p>hot [1] 16/24</p> <p>hour [1] 10/3</p> <p>how [17]</p> <p>huge [1] 16/1</p> <p>huh [1] 52/6</p> <p>Huling [1] 24/22</p> <p>hundred [1] 85/25</p> <p>hurt [2] 48/22 88/18</p> | <p>inherently [1] 86/12</p> <p>initial [8]</p> <p>initiated [1] 86/1</p> <p>inmate [1] 70/24</p> <p>inquiry [1] 45/4</p> <p>insist [1] 30/14</p> <p>insists [1] 25/20</p> <p>inspection [1] 11/4</p> <p>instruct [1] 29/6</p> <p>instructed [1] 66/22</p> <p>instruction [2] 4/1 4/18</p> <p>instructions [13]</p> <p>intellectual [1] 49/14</p> <p>intelligent [1] 49/12</p> <p>intend [1] 15/24</p> <p>intended [4]</p> <p>intending [3] 15/2 70/2 77/13</p> <p>intends [4]</p> <p>Intensity [1] 55/4</p> <p>intent [1] 4/25</p> <p>intention [1] 10/6</p> <p>inter [1] 55/12</p> <p>inter-agency [1] 55/12</p> <p>interest [2] 41/15 81/24</p> <p>interested [3] 35/3 45/9 65/7</p> <p>intern [1] 3/12</p> <p>interpret [1] 49/18</p> <p>interpretation [1] 76/23</p> <p>interview [2] 78/3 82/21</p> <p>interviewed [2] 10/3 47/25</p> <p>interviewing [1] 85/23</p> <p>intimidate [1] 49/6</p> <p>intimidated [1] 85/1</p> <p>intimidating [2] 85/12 86/9</p> <p>intimidation [2] 78/13 80/12</p> <p>into [24]</p> <p>intrinsic [4]</p> <p>introduce [3] 15/2 15/24 63/12</p> <p>introduction [1] 62/2</p> <p>investigate [2] 85/8 85/21</p> <p>involuntary [1] 18/11</p> <p>involved [9]</p> <p>involvement [1] 41/8</p> <p>irony [1] 82/19</p> <p>irrespective [1] 22/10</p> <p>is [282]</p> <p>isn't [7]</p> <p>issue [11]</p> <p>issues [11]</p> <p>it [208]</p> <p>it's [57]</p> <p>items [1] 30/3</p> <p>its [4]</p> <p>itself [3] 40/22 78/10 80/7</p> | <p>jump [2] 20/5 41/19</p> <p>jumpsuit [1] 20/20</p> <p>jurisdiction [6]</p> <p>jurisdictions [1] 25/18</p> <p>juror [4]</p> <p>jurors [6]</p> <p>jury [27]</p> <p>just [56]</p> <p>justice [1] 43/20</p> <p>justify [1] 62/19</p> |
| <p>I</p> <p>I'd [8]</p> <p>I'll [10]</p> <p>I'm [87]</p> <p>I've [11]</p> <p>I.C.E [1] 47/25</p> <p>i.e [1] 91/20</p> <p>idea [1] 46/3</p> <p>identification [2] 38/12 57/20</p> <p>identified [2] 85/20 87/19</p> <p>idiosyncratic [1] 26/10</p> <p>if [134]</p> <p>impact [1] 86/13</p> <p>impanel [2] 9/6 10/6</p> <p>implicate [2] 65/17 65/17</p> <p>implicated [1] 34/20</p> <p>implicating [1] 73/11</p> <p>implication [1] 85/10</p> <p>implications [3] 19/25 23/6 33/1</p> <p>important [3] 50/13 64/22 77/5</p> <p>improper [1] 62/4</p> <p>in [291]</p> <p>incarcerated [4]</p> <p>include [4]</p> <p>includes [1] 86/16</p> <p>including [1] 90/24</p> <p>incompetent [3] 32/15 62/9 64/16</p> <p>inconsistent [4]</p> <p>incorporated [1] 4/13</p> <p>incredible [1] 66/22</p> <p>incriminating [2] 70/10 70/22</p> <p>independent [1] 27/1</p> <p>indicate [2] 12/4 55/1</p> <p>indicated [4]</p> <p>indicates [1] 42/8</p> <p>indicating [1] 99/11</p> <p>indictment [1] 15/17</p> <p>individual [3] 17/5 49/13 49/15</p> <p>individuals [1] 26/13</p> <p>ineffective [1] 61/19</p> <p>ineffectiveness [1] 64/1</p> <p>inference [3] 76/13 76/21 80/4</p> <p>information [19]</p> <p>informed [1] 86/14</p> <p>inherent [1] 88/13</p> | <p>J</p> <p>J-A-R-V-I-S [1] 20/12</p> <p>jail [4]</p> <p>jailhouse [1] 70/25</p> <p>jam [1] 6/4</p> <p>JARVIS [23]</p> <p>jeopardy [1] 78/24</p> <p>Jerry [1] 75/10</p> <p>Jiles [1] 68/7</p> <p>JOAQUIN [3] 1/5 20/23 100/8</p> <p>job [1] 8/14</p> <p>John [1] 77/1</p> <p>jointly [1] 97/21</p> <p>jointly-approved [1] 97/21</p> <p>Jonathan [3] 1/16 1/17 3/10</p> <p>Jones [2] 13/4 74/10</p> <p>JOSE [5]</p> <p>judge [35]</p> | <p>K</p> <p>keep [8]</p> <p>kill [4]</p> <p>killed [4]</p> <p>killer [1] 89/19</p> <p>killing [3] 68/14 79/24 86/16</p> <p>kilogram [1] 55/19</p> <p>kilograms [2] 41/3 44/13</p> <p>kilos [4]</p> <p>kind [4]</p> <p>kinds [1] 88/21</p> <p>knew [4]</p> <p>know [78]</p> <p>knowledge [5]</p> <p>known [5]</p> <p>knows [3] 11/22 74/6 82/18</p> <p>L</p> <p>laid [3] 67/19 67/23 77/17</p> <p>landmine [1] 93/8</p> <p>Lane [1] 1/21</p> <p>large [3] 12/19 16/15 44/11</p> <p>larger [1] 41/13</p> <p>last [5]</p> <p>late [1] 31/5</p> <p>later [10]</p> <p>Lavia [2] 23/21 23/21</p> <p>law [11]</p> <p>laws [1] 4/18</p> <p>lawyer [35]</p> <p>lawyer's [1] 66/19</p> <p>lawyers [1] 63/8</p> <p>lead [1] 64/4</p> <p>leading [4]</p> <p>learn [1] 3/14</p> <p>learned [1] 22/24</p> <p>least [7]</p> <p>leave [3] 58/22 93/20 99/12</p> <p>led [5]</p> <p>left [2] 58/9 61/17</p> <p>legitimate [1] 87/1</p> <p>length [1] 9/7</p> <p>lengthy [1] 26/23</p> <p>Leonard [2] 26/8 26/11</p> <p>less [2] 54/9 82/8</p> <p>let [26]</p> <p>let's [8]</p> <p>letter [23]</p> <p>letters [1] 32/24</p> <p>level [1] 81/23</p> <p>liberty [1] 88/10</p> <p>lie [5]</p> <p>lied [3] 51/1 64/22 65/14</p> <p>lies [1] 52/4</p> <p>like [29]</p> <p>liked [1] 26/16</p> <p>likely [1] 97/5</p> <p>limine [5]</p> <p>limit [1] 94/23</p> <p>limited [2] 94/11 94/22</p> <p>line [1] 90/13</p> <p>lines [1] 31/9</p> |

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